CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

CITY OF BREMERTON, et al., Petitioners, v. KITSAP COUNTY, Respondent, MANKE LUMBER COMPANY; OVERTON FAMILY; MCCORMICK LAND COMPANY; OLYMPIC PROPERTY GROUP; and PORT OF BREMERTON, Intervenors, and 1000 FRIENDS OF WASHINGTON, *Amicus Curiae*.	**CPSGMHB Consolidated Case No. 04-3-0009c** ***(Bremerton II)***[1] **FINAL DECISION AND ORDER**

I. BACKGROUND[2]

On December 8, 2003 the Kitsap County Board of Commissioners adopted Ordinance No. 311-2003 amending the County Comprehensive Plan and Map for 2003 and amending the County Zoning Code and Map. The Board received Petitions for Review (**PFR**) from the City of Bremerton and from Suquamish Tribe, et al. The Board combined the two PFRs into CPSGMHB Consolidated Case No. 04-3-0009c. The Board conducted a Prehearing Conference and issued a Prehearing Order (**PHO**) containing the schedule and statement of issues for this consolidated case. The Board granted Manke Lumber Company, Overton Family, McCormick Land Company, Olympic Property Group and

[1] For convenience of reference this case is identified as "Bremerton II" to distinguish it from a previous case (95-03-0039c) involving the same petitioner and respondent.

[2] See Attachment–A Procedural History for more complete details.

the Port of Bremerton status to Intervene on behalf of Kitsap County.[3] The Board's Order on Motions of April 22, 2004 admitted Supplemental Exhibits No. 1 and No. 2, and dismissed six issues. The Board received written briefs[4] from the parties in accordance with the case schedule and conducted a Hearing on the Merits (**HOM**) on June 10, 2004.

The Ordinance at issue in this complex case amends the Kitsap County Comprehensive Plan by adopting a new set of policies concerning Rural Wooded Lands (formerly Interim Rural Forest lands). The Ordinance also adopts three subarea plans which alter the boundaries of designated Urban Growth Areas in three locations: McCormick Woods/ULID #6, South Kitsap Industrial Area (SKIA), and Kingston.

The Board's analysis deals first with the Rural Wooded lands, addressing Legal Issues 10, 7, 9 and 11, in that order. The Board then deals with Legal Issue No. 25, concerning critical areas, as that seems to relate primarily to the proposed wooded lands policies.

The second part of the decision focuses on the UGA expansions, starting with Legal Issues 13, 23 and 24, which pose questions about the population projections and allocations used in the County planning process for these expansions. The Board then assesses each of the three UGAs which were modified by the Ordinance – ULID #6, SKIA, and Kingston – in light of the questions raised by Legal Issues 12, 14, and 15. In essence, these are the size and locational criteria for designating or expanding UGAs. Legal Issue 24 is a follow-on question concerning development regulations for ULID #6 and SKIA.

The final section of the decision deals with the County's Buildable Lands Report (**BLR**) and the questions posed in Legal Issues 17, 18, 19, 20, and 21.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioners challenge Kitsap's adoption of Ordinance No. 311-200. Pursuant to RCW 36.70A.320(1), Kitsap's Ordinance No. 311-200 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by Kitsap County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [the County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the County's actions clearly erroneous, the Board must be "left with the firm and

[3] 1000 Friends of Washington was granted status as *Amicus Curiae* but later chose not to file a brief.

[4] Hereafter, the briefing received is referred to as follows: 1) City PHB; 2) Tribe PHB; 3) County Response I; 4) County Response II; 5) Manke Response; 6) Overton Response; 7) McCormick Response; 8) Port Response; 9) City Reply; and 10) Tribe Reply.

definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.320(1), the Board will grant deference to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified: "Consistent with *King County* and notwithstanding the 'deference' language of RCW 36.70A.320(1), the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 31 P.3d 28 (2001).

In affirming the *Cooper Point* court, the Supreme Court stated:

> Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

III. BOARD JURISDICTION, PRELIMINARY ITEMS, ABANDONED ISSUES.

A. BOARD JURISDICTION

The Board finds that the Petitioners' PFRs were timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the County's Comprehensive Plan and Map for 2003 and amends the County's Zoning Code and Map, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

During the Hearing on the Merits, the Board made the following rulings:

1. On or before June 17, 2004, the appropriate parties will file with the Board lists of the exhibits submitted with the following briefs: City's Prehearing Brief; Errata to Suquamish Tribe's Opening Brief and Omitted Exhibits; Kitsap County's Prehearing Brief Regarding Issues 7-11, 24, 25 and 27; Kitsap County's Prehearing Brief on Issues

12 through 23, 26 and 27; Manke Lumber Company's Response to Petitioners' Prehearing Briefs.

2. Kitsap Motion to Strike Suquamish Exhibit 26510, except table 1, page 4 was **granted**.

3. On Kitsap Second Motion to Strike, regarding Suquamish Reply Brief attachments IR-A and IR-B, the parties agreed that the two attachments are both part of the record under Exhibit 24629.

4. The City questioned the adequacy of the record provided by the County, indicating that the index was more extensive than required and therefore it was difficult to find individual exhibits. HOM Transcript, at 10-15.

WAC 242-02-520 defines what should be included in the Index of the Record. The Index should include "all materials used in taking the action which is the subject of the petition for review. The index shall contain sufficient identifying information to enable unique documents to be distinguished." Therefore, when "amendments to Plans" are challenged the record only needs to include those materials used in making the "amendments," not all materials that were considered from the beginning of development of the Plan. The Board often requires the document that is being amended (*e.g.* the Plan) to be submitted as a "Core Document." Materials that were considered in the original adoption action can be admitted as supplemental exhibits to the present challenged action.

If any of the parties would like to suggest clarifying language for the Boards' Rules on this matter, it would be welcomed.

5. The Board took official notice of documents cited in footnotes to the briefs.

6. Kitsap was given until June 17, 2004 to review and, if necessary, submit a short response to a Statement of Additional Authority offered by Suquamish. Kitsap, Suquamish and Overton submitted responses regarding Additional Authority.

7. The following exhibits were admitted during the hearing:

a. Kitsap County Comprehensive Plan, Land Use Map. (Two copies previously submitted with Core Documents).

b. **HOM Demonstration Item #1**. Untitled Map/Illustration submitted by Suquamish for illustrative purposes related to clustering provisions of Kitsap Ordinance No 311-2003. The objection by Overton Family to the admission of this item was noted by the Board.

c. **HOM Demonstration Item #2**. Map entitled "Kitsap County Forest Lands," with insets, submitted by Suquamish for illustrative purposes related to clustering provisions of Kitsap Ordinance No 311-2003. The Board noted an objection of Kitsap

and a clarification by Suquamish that the base map for this item is a County map but two insets were added by Suquamish.

Exhibit #24629 (excerpt): Letter dated Nov. 26, 2002, submitted by Suquamish in relationship to preliminary Item # 3, *supra*.

C. ABANDONED ISSUES

The Board's Rules of Practice and Procedure provide:

> A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issues*. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's March 15, 2003 PHO in this matter states, "Legal issues, or portions of legal issues, *not briefed in the Prehearing Brief* will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits." PHO, at 8 (emphasis supplied).

Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

In review of the City PHB, the Board did not find any argument related to Legal Issue No. 8.[5] Therefore, the Board deems Legal Issue No. 8 **abandoned**. *See* City PHB, at 1-28.

Legal Issue No. 16[6] addresses the County's application of the GMA planning goals to the three UGA expansions. Respondent alleges that Petitioners have abandoned Legal Issue 16 due to inadequate briefing. County Response II, at 17.

In review of the Tribe PHB, the Board found only a conclusory statement that the UGA expansions "contravene the GMA planning goals (RCW 36.70A.020)." Tribe PHB, at 45.[7] Therefore, the Board deems Legal Issue No. 16 **abandoned.**

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[5] Legal Issue 8: *Did the County violate RCW 36.70A.110 by adopting comprehensive plan policies for the IRF allowing for non-rural densities, thereby allocating growth to the IRF, not the UGA (even though the County has not identified how much growth will occur in the IRF as a result of these new amendments)?*

[6] Legal Issue 16: *Did the County fail to be guided by the Act's goals, RCW 36.70A.020 (1), (2), (5), (8), (9), (10), and (11) when it used the Ordinance to expand UGAs?*

In review of the Tribe PHB, the Board did not find any argument related to Legal Issue No. 22. In the "errata" sheet submitted to the Board, the Tribe conceded that it was abandoning Legal Issue No. 22.[8] Therefore, the Board deems Legal Issue No. 22 **abandoned**. *See* Tribe PHB, at 1-72.

IV. LEGAL ISSUES AND DISCUSSION

A. RURAL WOODED LANDS[9]

Prior to setting forth and discussing the Legal Issues, the Board summarizes the action taken by the County pertaining to Rural Wooded Lands that precipitated these issues.

The Rural Wooded Amendments:

Section 10, subsection 1, of Ordinance No. 311-2003 adopts the 2003 text and policy revisions in Attachment 1.

Section 10, subsection 7, of Ordinance No. 311-2003 provides:

> Approve the revised comprehensive plan language relating to the Rural Wooded lands included within attachment 1. Furthermore, DCD staff is directed to develop Development Regulations for the Rural Wooded policies, and present those regulations to the BCC no later than nine (9) months from the effective date of this ordinance.

Attachment 1 includes the General and Specific Text Amendments to the County's Comprehensive Plan. The County provided the Board with a color coded "Errata Sheet" of the Kitsap County Comprehensive Plan, dated December 8, 2003. The "Errata Sheet" corrects typographical errors and fills in missing references on Attachment 1 to Ordinance No. 311-2003.

The first change made in the general text amendments is that the prior reference to "Interim Rural Forest" (**IRF**) is deleted and changed to "Rural Wooded" (**RW**).

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[7] The Board notes that at least one of the challenged UGAs, the Kingston Sub-Area Plan, includes a point-by-point review of the 13 GMA planning goals, stating how they are furthered by the Subarea Plan. Kingston Plan, at 10-2 to 10-4. The Tribe's briefs and arguments did not put these statements in issue.

[8] Legal Issue 22: *Whether Kitsap County failed to be guided by RCW 36.70A.020(11) and violated RCW 36.70A.140 and RCW 36.70A.210 by failing to coordinate with the Suquamish Tribe the Comprehensive Plan and development regulation amendments adopted in the Ordinance? See, e.g., CP-8; CP-9; and UGA-4.*

[9] Rural Wooded Lands (RW designation) were formerly known as Interim Rural Forest Lands (IRF designation). Ordinance No. 311-2003 changed all reference in the Plan and on the future land use map from IRF to RW.

Ordinance No. 311-2003, Attachment 1 – Errata Sheet, at 1. [Hereafter, the Board will identify Rural Wooded Lands (**RWL**) by the acronym RWL].

The second change precipitated by the RWL amendments is a change to a Land Use Table – LU-2, within the Plan's Land Use Element. This Table is updated to indicate that within the Rural Wooded land use designation there are **49,212 acres** in unincorporated Kitsap County now designated as RWL. *Id.*, at 4.

Ordinance No. 311-2003, Attachment 1, at 7-10, adds a new explanation of the RWL designation and adds new RWL Policies 10 and 11. These new text amendments are as follows:

> **Rural Wooded**. This designation is applied to lands throughout Kitsap County that were formerly designated "Interim Rural Forest." The goals for this designation are to:
>
> - Provide on-going opportunities for continued management of these lands for forestry, open space, or other compatible uses to promote a large-scale, connected landscape. These lands are important for their rural character, economic values, natural resource uses, ecological functions and values, and public benefits.
> - Preserve rural character, and allow a variety of levels of rural residential densities and encourage innovative rural planning techniques while meeting the intentions and requirements of the Growth Management Act.
> - Provide a high standard of environmental protection, facilitate the creation of open space corridors, minimize shoreline impacts, and promote residential development that is sensitive to the physical characteristics of the land.
>
> **Rural Wooded Lands [Policies]**
>
> **RL-10a**
> Lands designated as Rural Wooded form a large-scale, connected landscape. These lands are important for their rural character, providing housing at rural densities, economic values, natural resource uses, ecological functions and values, and public benefits. To maintain and enhance these important functions and values for future generations, Rural Wooded lands should provide on-going opportunities for continued forestry, open space, and other compatible uses.
>
> **RL-10b**
> Prior to accepting any applications pursuant to this policy, the County shall adopt development regulations that specifically address the criteria and objectives of this RL-11a – RL-11g section including but not limited to how the rural character will be preserved and urban growth in the rural area will be prevented.

RL-11a
To encourage Rural Wooded landowners to realize economic benefits from their land, a variety of incentive-based land conservation programs should be developed and implemented for all Rural Wooded land. Such incentives would include a Transfer of Development Rights (TDR) program, tax incentives, coordinating and directing private, state and federal funding for land acquisition or conservation easements, and allowing clustering of residential development.

RL-11b
The base residential density of lands designated Rural Wooded is one dwelling unit per 20 acres. A density of one dwelling unit per 5 acres is allowed if residential units are clustered, subject to the following criteria:

1. Fifty percent (50%) of the site would be placed in a "Wooded Reserve" where forestry would be permitted and encouraged pursuant to the State Forest Practices Act [RCW 76.09.050, WAC 222-16-050(2) and WAC 222-20-040(3)]. Properties in "Wooded Reserve" may not be developed or subdivided earlier than 40 years. Any residential development potential remaining in the Wooded Reserve after 40 years from the approval of a clustering proposal may be transferred to other areas offsite as provided by TDR programs or may be achieved through clustering on site.

2. The remaining fifty percent (50%) may be developed for residential uses, provided that either:
    A. One-half of this portion of the site (or 25% of the total site area) shall be placed in a permanent open space tract where no development or forestry uses would be allowed, and the remaining area would be developed for residential uses; or;
    B. The fifty percent (50%) of the property set aside as "Wooded Reserve" (see #1, above) is designated as permanently undevelopable and placed in a permanent tract where forestry may be practiced, and the remaining 50% of the site area would be developed for residential uses.

3. On the portion of the site that is developed, development shall be clustered and innovative rural planning techniques encouraged.

4. There shall be no more than 25 units per cluster. No new urban services shall be provided to individual lots or clusters. However, common drain fields, community wells and public water systems, and other techniques to minimize impacts on natural systems will be encouraged.

5. Clusters developed under this program shall provide a vegetated buffer or 100 feet from existing public roadways or equivalent visual separation from adjoining properties in order to preserve rural character and the aesthetic values of rural wooded lands.

6. A minimum parcel size of 20 acres is required to use this mechanism. Smaller lots which have been designated Rural Wooded may participate through aggregation to the minimum lot size.

7. No more than 1,000 contiguous acres may use this mechanism for a single project. Projects in this program may have single or multiple ownerships.

8. The developed portions of those properties seeking to utilize this mechanism shall comply with all existing Kitsap County development regulations including but not limited to the Critical Areas Ordinance in order to protect environmental features.

9. To ensure each proposal submitted for review pursuant to this policy and associated implementing regulations complies with these requirements, and preserves rural character and prevents urban growth in the rural area, a site plan review process with Hearing Examiner review is required. That site plan review process may be combined with a hearing on a preliminary plat or short plat application. In conducting the site plan review the Hearing Examiner may approve a proposed site plan if the examiner finds that the proposed site plan complies with policies RL-11a through RL-11g and associated implementing regulations.

RL-11c

Rural Wooded parcels larger than 40 acres in size that adjoin shorelines may utilize a density of one dwelling unit per 2.5 acres if residential units are clustered and the landowner commits to permanently continue forestry use on a portion of their land that includes the shoreline, subject to the criteria in RL-11b(3-9), above and the following:

1. The area established for forestry use shall be designated as a "Wooded Shoreline Preserve" tract encompassing the area from the ordinary high water mark to the top of the slope, i.e., the highest point of land where hillslopes (including intermediate benches) meet the upland plateau area.

2. The "Wooded Shoreline Preserve" area shall also include a setback area equal to 1 1/3 the height of the slope.

3. The total of 50% of the total parcel, including the Wooded Shoreline Preserve and the setbacks, shall be placed in permanent open space and managed for forestry. All residential development on the property shall be clustered on the remaining 50%.

4. Forestry within the "Wooded Shoreline Preserve" area shall be subject to the State Forest Practices Act [RCW 76.09.910, WAC 222-50-020(3)].

RL-11d
Conservation easements or other sufficient mechanisms specifying uses and restrictions shall be applied to forestry and or open space tracts created pursuant to policies RL-11a-c.

RL-11e
In cooperation with landowners, stakeholders and others the County will develop and implement a system to monitor the effectiveness of all Rural Wooded incentive programs, and the compatibility and impacts of land uses in Rural Wooded areas. Monitoring will be conducted on an annual basis and presented in a report by January 31 of the following year. In addition, a 10,000 acre or 5 year threshold for a 'stop and assess' report will be implemented, where all applications will be halted until a report has been generated and submitted.

RL-11f
The Washington State Department of Natural Resources should continue to act as lead agency for forestry practices on Rural Wooded lands [RCW 76.09.050].

RL-11g
Kitsap County should work with landowners, stakeholders, and state and federal agencies to assess the natural functions and values of Rural Wooded lands and should direct conservation programs and efforts towards areas with the most important values.

RL-11h
The Implementing Development Regulations will include language to inform future purchasers that urban level services will not be provided to these lands.

RL-11i
The implementation ordinance will be completed no later than July 31, 2004.

Ordinance No. 311-2003, Attachment 1, at 10, also adds new text to the Plan under "Implementation Strategies and Programs," as follows:

> Develop the incentive programs described above in RL-10 and RL-11 using an open, public process that involves interested landowners, tribes, and stakeholder groups.

The Legal Issues

There are five Legal Issues grouped under the Rural Wooded Lands topical heading. One of them has been abandoned (Legal Issue No. 8). The other four issues are Legal Issues 7, 9, 10 and 11. The Board will address these Legal Issues in the following order: first, Legal Issue 10; second, Legal Issue 7; third, Legal Issues 9 and 11, together.

Legal Issue No. 10

The Board's PHO sets forth Legal Issue No. 10 as follows:

> ***10. Whether the County failed to comply with the consistency requirements of RCW 36.70A.070(preamble), RCW 36.70A.080(2), and RCW 36.70A.210 when it amended the provisions of the Interim Rural Forest [IRF] designation to allow urban growth in rural areas in violation of RCW 36.70A.100, RCW 36.70A.011 and WAC 365-195-330, the County-wide Planning Policies and other policies of the Comprehensive Plan?***

Applicable Law and Discussion

Position of the Parties:

The City asserts that the County did nothing to coordinate its Plan amendments with the City of Bremerton and that in mid-October the City wrote to the County Commissioners objecting to the proposed rural wooded amendments impacts on growth outside urban areas and the ability of cities to meet their own development goals and growth projections. The City states, "The County ignored these comments and proceeded with adoption of the [rural wooded designations]." City PHB, at 21-22.

The County counters that the letter in question was submitted by the City to the County after the County had closed the record on the rural wooded lands amendments. Therefore, the County concludes, it could not consider it. More importantly, the County points out that RCW 36.70A.100 requires consistency among jurisdictional plans, and the City has provided no evidence or argument to show any inconsistencies between provisions of the City of Bremerton's Plan and Kitsap County's Plan. County Response I, at 27-28. The County also states, "While the extra-record letter used by the City to support this argument expresses concerns about the rural areas, it makes no statements about problems with coordination or consistency between the City and the County Comprehensive Plans." *Id.*, at 28.

Intervenor Overton notes that the City 1) fails to point to any County-wide Planning Policy (**CPP**) that the RWL policies are inconsistent with; and 2) does not identify any provision in the City's Plan that conflicts with the County's RWL policies. Therefore, Overton concludes, there can be no violation of RCW 36.70A.100. Overton Response, at 14.

In reply, the City asserts:

> The 'inconsistency' [between the City and County Plans] is that the County is required to comply with GMA when it determines the density to be imposed on rural and urban property in the County. It is beyond belief that the County feels justified in its adoption of Ordinance No. 311, without performing any analysis of the impacts that this will have on affected fire districts, school districts or the City's transportation system (to name just a few), as if its land use decisions have no repercussions beyond the County line.

City Reply, at 13.

Board Discussion:

Notwithstanding the provisions of the Act cited in Legal Issue 10 by the City, the focus of the argument lies within provisions of RCW 36.70A.210 and .100. The significance of RCW 36.70A.210 in this discussion is that .210 establishes that the County-wide Planning Policies (**CPPs**) provide a *county-wide framework* for the development and adoption of city and county plans. "This framework shall ensure that city and county plans are consistent as required in RCW 36.70A.100." RCW 36.70A.210(1). *See also* RCW 36.70A.100. Thus, if a county Plan is consistent with the CPPs and a city Plan is consistent with the CPPs; there is a presumption that the city and county plans are consistent as required by .100.

The Board has stated that "consistency means that provisions [of Plans] are compatible with each other – that they fit together properly. In other words, one provision may not thwart another." *West Seattle Defense Fund v. City of Seattle* (***WSDF I***), CPSGMHB Case No. 94-3-0016, Final Decision and Order, (Apr. 4, 1995), at 27. Additionally, as the County noted, the Board explained that to demonstrate inconsistency between Plans of different jurisdictions, "[P]etitioners must identify the provision of the challenged plan and explain how it is uncoordinated with or inconsistent with a provision of another jurisdiction's comprehensive plan." *Corinne Hensley v. City of Woodinville* (***Hensley III***), CPSGMHB Case No. 96-3-0031, Final Decision and Order, (Feb. 25, 1997), at 13.

The City has not identified a CPP that the County's Rural Wooded Lands amendments are inconsistent with, nor has the City identified any provisions in its Plan that is made incompatible with, or is thwarted by, the County's Rural Wooded Lands amendments. The Board agrees with the County. The City's letter was too little, too late, to alert the

County of any potential inconsistencies between the City Plan and the pending RWL amendments. Further, other than identifying potential impacts related to the RWL amendments, the City did not explain in its PHB how the RWL amendments were inconsistent with any provision in the City's Plan. The Board concludes that Petitioners **failed to carry the burden of proof** in demonstrating inconsistency between the City and County Plans contrary to the provisions of RCW 36.70A.100.

Conclusion – Legal Issue No. 10

The Board concludes that Petitioners **failed to carry the burden of proof** in demonstrating inconsistency between the City and County Plans contrary to the provisions of RCW 36.70A.100.

Legal Issue No. 7

The Board's PHO sets forth Legal Issue No. 7 as follows:

7. ***Did the County violate RCW 36.70A.040 because it did not concurrently review the proposed comprehensive plan amendment to the IRF lands with the development regulations, to maintain consistency?***

Applicable Law and Discussion

Position of the Parties:

The City argues: 1) having SEPA review at the project development permit stage will not allow for mitigation of impacts, since projects will have acquired unstoppable administrative inertia [based upon the RWL Plan polices]; 2) if a change in a plan necessitates a change in development regulation, both changes must be done concurrently to maintain consistency; 3) had it been possible to draft development regulations to implement the RWL policies, it would have been done; and 4) it would be impossible to draft development regulations that maintain rural character while allowing [alleged] urban development in the rural area. City PHB, at 25-27.

The County acknowledges that its Plan and development regulations must be consistent, but argues there is nothing in the GMA barring the County from setting up a framework in its Plan to provide the basis for future development regulations (*citing* prior Board cases). County Response I, at 19-20. Additionally, the County contends, "The zoning regulations currently in effect allow a [residential] density of 1 du/20 acres; this will still be allowed even after the implementing regulations for the incentive program take effect." *Id.*, at 21. The County also asserts that the RWL amendments made no major changes in the uses allowed, but did change the [residential] development potential which will be effective when the new development regulations implementing the clustering incentive program are adopted. *Id.*, at 22.

Intervenor Manke concurs with the County's assessment that there is no inconsistency created by the RWL amendments. Manke Response, at 26-27.

In reply, the City argues that drafting development regulations based upon the RWL policies will yield regulations that allow suburban or urban densities in the rural area which is contrary to the Act. City Reply, at 10.

Board Discussion:

The GMA requires a jurisdiction's development regulations to be consistent with, and implement, its comprehensive Plan. *See* RCW 36.70A.040. The essence of the City's argument on this issue is: since the County did not adopt implementing regulations for the RWL policies at the same time as it adopted the new RWL Plan policies, then the Plan and [existing] development regulations must be inconsistent. While that may be true in some circumstances, the Board concludes that it is not the case here.

First, the Act does not specifically mandate that Plans and development regulations be adopted concurrently. However, as the Board has previously indicated, concurrent adoption of Plan amendments and implementing development regulations may be the wisest course of action to avoid inconsistencies between the Plan and development regulations. *See: Jody L. McVittie v. Snohomish County* (***McVittie V***), CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2000), footnote, at 7. However, concurrent adoption of development regulations may not be necessary if the existing development regulations continue to implement the Plan as amended. This is the situation posed here.

The base residential density for RW lands is one dwelling unit per twenty acres. *See* Ordinance No. 311-2003, Policy RL-11b. The existing implementing zone for lands previously designated IRF[10], but now designated RW, is R-20, which permits one residential dwelling unit per 20 acres. County Response I, at 21. The City does not dispute that the existing R-20 zoning governs the new RWL designation. Therefore, the Board concludes that the new RWL Plan policies and the existing development regulations are not inconsistent related to the 1 du/20 acre residential density.

The Board acknowledges that the new RWL Plan policies describe a complex system for potentially increasing densities if various conditions are satisfied and development is limited to clusters. However, as Petitioners acknowledge, there are no development regulations to implement the incentive and clustering program advanced in the RWL Plan policies. Therefore, until such time as development regulations are adopted for the RWL Plan policies, they cannot be implemented.

[10] One of the first changes the Ordinance made was to delete all reference to "Interim Rural Forest" and insert "Rural Wooded;" thus the existing zoning regulations for "IRF" designations, implement the "RW" designations.

The Board, as well as the Court[11], has clearly indicated that Plans provide policy direction to land use decision-making by providing guidance and direction to development regulations, which must be consistent with and implement the Comprehensive Plan. In turn, the development regulations govern the review and approval process for development permits. *See Laurelhurst Community Club, Friends of Brooklyn, University District Community Council, Northeast District Council and University Park Community Club v. City of Seattle [University of Washington – Intervenor]* (***Laurelhurst I***), CPSGMHB Case No. 03-3-0008, Order on Motions, (Jun. 18, 2003), at 11; *see also Vashon-Maury, et al., v. King County (Bear Creek portion)*, CPSGMHB Case No. 95-3-0008c, Order Finding Partial Noncompliance and Partial Invalidity, (Nov. 3, 2000), at 9-10; and *The Tulalip Tribe of Washington v. City of Monroe* (***Tulalip II***), CPSGMHB Case No. 99-3-0013, (Jan. 28, 1999), at 4.

Conclusion – Legal Issue No. 7

The Board concludes that the City has **failed to carry the burden of proof** in demonstrating that implementing development regulations must be adopted concurrently with the RWL Plan amendments; or that the existing development regulations are inconsistent with, and do not implement, the RWL policy amendments in the Plan.

Legal Issue Nos. 9 and 11

The Board's PHO sets forth Legal Issue No. 9 as follows:

> ***9. Whether the County violated RCW 36.70A.070(5) and RCW 36.70A.110(1) (precluding urban growth in rural areas), RCW 36.70A.011 and WAC 365-195-330 when it used the Ordinance to increase the density and to allow urban growth in the IRF?***

The Board's PHO sets forth Legal Issue No. 11 as follows:

> ***11. Did the County fail to be guided by the Act's goals, including RCW 36.70A.020(1), (2), (3), (5), (8), (10), (11) and (12) when it increased the intensity and density of allowed uses and allowed urban growth in the IRF?***

Applicable Law

The goals at issue here are: RCW 36.70A.020(1) [encouraging urban development in urban areas], (2) [reducing sprawl], (3) [encouraging efficient multimodal transportation], (8) [maintaining and enhancing natural resource industries and encouraging conservation of resource lands], (10) [protecting the environment], (11) [encouraging involvement of citizens in the planning process and interjurisdictional coordination], and (12) [ensuring public services and facilities needed to support development are adequate].

[11] *See Citizens of Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861; 947 P.2d 1208, (1997).

RCW 36.70A.110(1) requires Counties to designate urban growth areas (**UGAs**), "within which urban growth shall be encouraged and outside of which growth can only occur if it is not urban in nature."

RCW 36.70A.070(5) establishes the components of a county's mandatory rural element. This section of the Act provides, in relevant part:

> Rural Element. Counties shall include a *rural element including lands that are not designated for urban growth*, agriculture, *forest* or mineral *resources*. The following provisions shall apply to the rural element:
>
> a. Growth management goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, *a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter*.
>
> b. Rural development. *The rural element shall permit rural development,*[12] *forestry*, and agriculture *in rural areas*. *The rural element shall provide for a variety of rural densities*, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. *In order to achieve a variety of rural densities* and uses, *counties may provide for clustering*, density transfer, design guidelines, conservation easements, and other innovative techniques *that will accommodate appropriate rural densities and uses that are not characterized by urban growth and are consistent with rural character*.[13]

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[12] The Act defines "rural development" as:

> [Rural development] refers to development outside the urban growth area and outside agricultural, forest and mineral resource lands designated pursuant to RCW 36.70A.170. *Rural development can consist of* a variety of uses and residential densities, including *clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element*. *Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas*.

RCW 36.70A.030(15), (emphasis supplied).

[13] The Act defines "rural character" as:

> [Rural character] refers to the patterns of land use and development *established by a county* in the rural element of its comprehensive plan:
>
> a. In which open space, the natural landscape, and vegetation predominate over the built environment;
> b. That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in the rural areas;
> c. That provide visual landscapes that are traditionally found in the rural areas and communities;

c. Measures governing rural development. *The rural element shall include measures that apply to rural development and protect the rural character of the area*, as established by the county, by:
    i. Containing or otherwise *controlling rural development;*
    ii. *Assuring visual compatibility* of rural development with the surrounding rural area;
    iii. Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
    iv. *Protecting critical areas*, as provided in RCW 36.70A.060, and surface water and ground water resources; and
    v. *Protecting against conflicts with the use of* agricultural, *forest*, and mineral resource lands designated under RCW 36.70A.170.

(Emphasis supplied).

Discussion

Position of the Parties:

The City argues that the Kitsap County Planning Commission (**PC**) recommended that the County not consider any version of the RWL amendments until a viable Transfer of Development Rights Program (**TDR**) was developed. City PHB, at 5. The City cites the PC's findings, which include:

14. The proposed [RWL] policy revisions create the potential for additional housing sites in rural areas.

- Neither the number of sites nor their impact on rural character is defined.
- Encouraging growth in the rural area that is not urban in nature or that is inconsistent with the preservation of rural character is not supported by the Growth Management Act or by the Kitsap County Comprehensive Plan.
- Encouraging urban growth in the rural area could discourage development in the Kitsap County Urban Growth Areas.

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d. That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
e. That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
f. That generally do not require the extension of urban governmental services; and
g. That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

RCW 36.70A.030(14), (emphasis supplied).

15. The incentive based land conservation programs are not complete. The TDR program is not defined.
16. There is no consensus position on what the "density bonus program" should be . . .

- The potential that the density bonus program will result in negative, unintended consequences to rural character is too great.
- There has been no analysis of the potential impact this level of development would have on levels of service for schools, roads, parks, public safety and environmental concerns.
- The density bonus program impairs the flexibility, attractiveness and motivation to define the TDR program.

Id., at 4-5, *citing* PC Report, Ex. 24626.

The City then contends that to respond to the PC recommendation, the County deferred adoption of implementing regulations with direction to staff to address the undetermined impacts and concerns raised by the PC. The City cites RWL Policy RL-10b to support this contention. *Id.*, at 5-6 and 17. Rural Wooded Policy RL-10b provides:

> Prior to accepting any applications pursuant to this policy, *the County shall adopt development regulations that specifically address* the criteria and objectives of this RL-11a – RL-11g section including but not limited to *how the rural character will be preserved and urban growth in the rural area will be prevented.*

See Ordinance No. 311-2003, RWL Policies, *supra*, (emphasis supplied). The City also notes several other changes the Board of County Commissioners (**BCC**) made to the RWL policies in response to the PC recommendation. One was to include an annual monitoring policy that includes a "stop and assess report" found in RWL policy RL-11e, cited *supra*. The "stop and assess report" requires a report once a threshold of 10,000 acres or 5 years is reached; applications for clustering are halted until the report is generated. *See* Policy RL-11e. The City contends the delayed implementation and monitoring provisions do not comply with the provisions of RCW 36.70A.070(5). City PHB, at 7-14.

To illustrate the City's argument, it suggests that on a 40-acre parcel, clustering under the RWL policies, instead of two dwelling units being permitted, eight dwelling units would be permitted; and these eight would be confined to 10 acres, yielding 1 ¼ acre lots – not a rural density but an urban density. *Id.*, at 14-15. If the same property adjoined a shoreline, the clustered density would allow 16 dwelling units on 10 acres, yielding less than 1-acre lots, again allegedly not a rural density but an urban density. *Id.*

Citing Court and Board cases, the City contends that 5-acre lots are a minimum rural density, and the lots created through the operation of the RWL policies yield urban lots in violation of the Act. *Id.*, at 15-17. Additionally, the City asserts that the RWL policies

apply to parcels as large as 1000 acres, which would allow 200 new residential units (more on shorelines), and which would have significant adverse impacts on schools, fire protection, and roads. None of these impacts, the City argues, were evaluated by the County. *Id.*, at 18-21.

Finally, the City argues that the RWL policies are not guided by the goals of the Act because they will: encourage growth in the rural areas where facilities and services will not be available; encourage low density sprawl; discourage coordinated multimodal transportation; not conserve forest lands; and not protect the environment along the shoreline or rural wooded areas especially since no environmental analysis has occurred. *Id.*, at 22-25.

The Tribe argues the present RWL policies are an outgrowth of prior efforts by the County to allow urban growth in the rural area. Tribe PHB, at 46-48. The Tribe refers to the County's prior "Conservation Easement Ordinance" (**CEO**) which allowed clustering and was struck down by this Board in *Kitsap Citizens for Rural Preservation, et al., v. Kitsap County* (***KCRP***), CPSGMHB Case No. 94-3-0005, Final Decision and Order (Oct. 25, 1994). While the Board did find the CEO noncompliant with the Act, the Board noted that it could "conceive of a well-designed compact rural development containing a small number of homes that would not look urban in character, not require urban governmental services, nor have undue growth-inducing or adverse environmental impact on surrounding properties. . . [However, the CEO] does not have parameters to prevent development projects that constitute urban growth from occurring in rural areas." Tribe PHB, at 46-47, *citing KCRP*, at 11.

Petitioner also noted that in reviewing the County's Plan in 1997, the Board struck down 2.5-acre and 1-acre lot sizes in the rural area in *Bremerton, et al. and Port Gamble v. Kitsap County* (***Bremerton/Port Gamble***), CPSGMHB Case No. 95-3-0039c coordinated with Case No. 97-3-0024c, Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order Dismissing *Port Gamble*, (Sep. 8, 1997).[14] The Tribe then contends that the RWL policy amendments are another effort by the County to allow urban lots in the rural area. Tribe PHB, at 48.

Petitioner takes issue with the clustering densities, and argues even the limit of 25 units per cluster [RL-11b(4)] does not limit the number of clusters or proximity of clusters. *Id.*, at 49. Additionally, the Tribe contends that the portion of the parcel used for forestry for 40 years, the "Wooded Reserve," could precipitate additional development after the 40-year period had lapsed; therefore permitting even more density on the parcel. *Id.*, at 47-48. The Tribe agrees with the City that the development potential of RW lands on the shoreline yields even higher densities that are clearly urban. *Id.*, at 50-51. The Tribe also argues that cluster development undertaken pursuant to these policies would not constitute "limited areas of more intensive rural development" (**LAMIRDs**) as defined in the GMA – RCW 36.70A.070(5)(d). *Id.*, at 51-54.

[14] The County presents a historical background for the present effort that also acknowledges prior decisions of this Board. *See* County Response I, at 10-14.

Finally, the Tribe argues the RWL policies are not guided by the goals of the Act since they do not encourage compact urban growth within the UGAs, protect the environment or conserve resource lands; but instead undermine such urban development. *Id.*, at 54-58.

In response, the County contends it has been working on a rural/forest incentive program for six years, and the RWL policies, a product of that effort, provide a framework for preserving the rural area, protecting shorelines and fostering forestry uses in the rural area. County Response I, at 2. In addition to the historical backdrop noted by the Tribe, the County also refers to a Board case where one of the same Petitioners (*i.e.*, KCRP) challenged the Rural Element in the County's Plan, alleging it did not provide for a variety of rural densities, did not protect rural character and permitted urban growth in the rural area. In that case, the Board concluded that KCRP had failed to meet its burden of proof in demonstrating noncompliance with the GMA. However, the Plan was remanded with direction for the County to make a decision and designate forest resource lands of long-term commercial significance.[15] *Id.*, at 12, *citing Bremerton et al., v. Kitsap County*, CPSGMHB Case No. 98-3-0039c, coordinated with *Alpine v. Kitsap County*, CPSGMHB Case No. 98-3-0032c, Order Rescinding Invalidity in *Bremerton* and Final Decision and Order in *Alpine*, (Feb. 8, 1999). The County noted that policies in the 1998 Plan committed the County to "develop and consider a clustering program for residential development in designated resource areas." *Id.*, at 14, *citing* 1998 Plan Policy RL-35.

The County acknowledges that the RWL policies will allow between 50% and 75% of rural lands in the program to be preserved for forestry or open space for a minimum of 40 years, and due to clustering, densities will increase on 25% of the land in the program. However, the County contends that parameters such as the limitation on the number of units in a cluster, prohibition of urban services, buffer requirements, compliance with critical areas regulations, site-specific hearing examiner review and monitoring provide adequate protection to rural character. Additionally, the County notes that these policies are ineffective until the development regulations are adopted. *Id.*, at 2. The County asserts that Petitioners' case is based upon hypothetical and conclusory allegations which cannot support a finding of noncompliance. *Id.*, at 3.

The County contends that these framework policies are a "start;" the County is "still taking a hard look at what is needed to implement a viable [incentive] program that not only encourages forestry activities, but provides incentives to property owners to continue those activities, retain rural character, and realize on the value of their property." *Id.*, at 10.

[15] The County notes that in 1999, it ultimately designated 2700 acres as forest resource land, which was upheld in *Screen, et al., v. Kitsap County*, CPSGMHB Case No. 99-3-0006c, coordinated with *Alpine v. Kitsap County*, Case No. 98-3-0032c, Order on Compliance Re: Forestry Issues in *Alpine* and Final Decision and Order in *Screen*, (Oct. 10, 1999).

In specific response to the City's arguments, the County asserts that the City's hypothetical parcels focus on the clustered areas and ignore the fact that 50%-75% of the same parcel would be preserved as Wooded Reserve and/or open space – which would become the predominant feature of the landscape. *Id.*, at 24-25. The County also claims that without the development regulations "it is impossible to predict what will happen on the ground." *Id.*, at 25, footnote 14. The County then suggests [without explaining] that the RWL policies address all the aspects of "rural character" as defined by the GMA. *Id.* The County also notes that if the "stop and assess report" is akin to a moratorium, the County has authority to take emergency actions, and adopt interim and moratorium ordinances if necessary. *Id.*, at 26.

The County asserts that *both* Petitioners have inadequately briefed Legal Issue 11, related to compliance with the goals of the Act, or just offered conclusory statements. *Id.*, at 33-37. Nonetheless, the County asserts that the clustering provisions, with their restrictions, do not allow urban growth in the rural area and therefore do not conflict with its goals. *Id.* Additionally, the County asserts, "[N]o provision of the GMA specifically requires that a county 'discuss, address, and weigh any of the 13 planning goals in developing [its] comprehensive plan." *Id.*, at 37, *citing Manke v. CPSGMHB*, 113 Wn. App. 615, 627, 53 P. 3d 1011 (2002).

In specific response to the Tribe's arguments, the County contends that, like the City, the Tribe relies upon hypothetical situations and conclusory remarks to make its case. *Id.*, at 29. The County asserts that although the Tribe believes the incentive program is lacking in parameters, the RWL policies are consistent with prior Board decisions and there are adequate parameters in the framework policies to guide the RWL clustering program. *Id.* The County asserts that the RWL policies are not LAMIRDs, as the Tribe seems to suggest, and need not comply with those provisions of the Act. *Id.*, at 31. Finally, the County contends that one of the Board's prior cases dealing with clustering [*Sky Valley v. Snohomish County* (***Sky Valley***), CPSGMHB Case No. 95-3-0068c, Order on Compliance, (Oct. 2, 1997)] upheld clustering provisions because of a monitoring program. Like Snohomish County, Kitsap County's clustering program has annual monitoring and a "stop and assess" report to evaluate its clustering program; therefore, the County's program should also be upheld. *Id.*, at 32-33.

Intervenor Manke joins the County and Intervenor Overton in their response to the RWL policies generally, and responds specifically to the arguments offered by Petitioners related to the RWL policies as they relate to the shoreline preserve program [RL-11c]. The first distinction Manke makes related to the shoreline program is that to obtain the cluster density of 1 dwelling unit per 2.5 acres, the parcel must be at least 40 acres and at least 50% of the parcel must be *permanently* dedicated to open space and managed for forestry; there is no time horizon set for these lands. Manke Response, at 2-6, *see also* RL-11c(3). Additionally, Manke contends that only 6 miles of Kitsap County's 228 miles of shoreline is eligible for this program; and of that, Intervenor owns most of it [approximately 2000 acres] which is primarily interconnected land located along Hood Canal. *Id.*, at 6.

Manke contends that the County's shoreline incentive program will likely yield more shoreline preserved than if the shorelines were developed as 20-acre parcels as exists today. *Id*, at 8. Intervenor also hails back to policies in the 1998 Plan that indicated the County was going to pursue a program to preserve undeveloped rural shorelines in open space. *Id.*, at 9, *citing* Plan policy RL-11. Manke then argues that the strictly conditioned clustered development near shorelines at one dwelling unit per 2.5 acres along with permanent open space along the shoreline does preserve rural character, is not urban growth, and is an appropriate rural density. *Id.*, at 11-26. Finally, Manke contends that the RWL policies advance the goals of the Act challenged by Petitioners and also advance the housing, property rights and open space goals – RCW 36.70A.020(4), (6) and (9). *Id.*, at 27-30.

Intervenor Overton owns approximately 26,500 acres of the land that is now designated as RWL and potentially subject to the RWL policies.[16] Overton Response, at 1. Overton argues that the RWL policies "do nothing more than to finally implement the concepts that have been embedded in [the County's Planning process] for trying to keep as much forestry as possible for as long as possible in a county where forestry does not have long-term commercial viability, and for requiring smart, high quality rural development of those lands when and where development must occur." *Id.*, at 3. Overton asserts: 1) it is now finally established that the Rural Wooded lands are not GMA designated forest resource lands, and they do not have long-term commercial significance for forestry; and 2) when the Rural Wooded lands are developed it should be done with clustering. *Id.* Intervenor describes two schools of thought about the extent of development to allow on RW lands: one approach is "punitive" and limits development to very low densities (e.g., 1du/20 acres); the other is an incentive approach to allow continued forestry and higher density rural development. The County and Intervenor, in light of the local circumstances, are of the second school of thought, and the RWL policies reflect this. *Id.*, at 4-5.

Intervenor then argues that the RWL policies have the parameters that were lacking in the CEO that was invalidated by the Board in 1994, in the *KCRP* case. *Id.*, at 7. Further, Overton argues, the RWL policies are consistent with the Board's *Sky Valley* decision in 1997, since annual monitoring and a "stop and assess report" will be part of the program. *Id.*, at 8-9. Finally, Intervenor notes that in the shoreline incentive program forestry is limited to the shoreline area (governed by DNR and WAC 222-30-021) and residential development is confined to the upland portion of the slope, thereby protecting the shorelines. *Id.*, at 9-11.

In reply the City reiterates that lots smaller than 5 acres in the rural area constitute urban growth (*citing Sky Valley*, FDO, at 28.) and the RWL policies permit lots that are smaller than 5 acres in the rural area. City Reply, at 2-3. The City also urges the Board not to focus on the projected benefits the public would receive from preserving shorelines, but address the urban densities the RWL policies would permit on these same shorelines – It is not that "currently undeveloped shorelines will permanently remain undeveloped" but

[16] The RWL designation accounts for 49,212 acres. Ordinance No. 311-2003, Errata Sheet, at 4.

instead, "currently undeveloped shorelines will be developed now at densities above those allowed under GMA for rural areas." *Id.*, at 4-6. Petitioner questions why, after all the years of negotiation and discussion, has the County been unable to craft development regulations to implement the RWL policies; suggesting that the answer is that compliant development regulations cannot be drafted since the RWL policies permit urban growth in the rural area and violate the Act. *Id.*, at 9-11, and 17-18.

In reply the Tribe notes that the Board has stated, "[W]hile no clear break point is evident in the information presently before the Board, it is only logical that, at some point along the continuum of potential project size and intensity, the *quantitative* dimension of cluster development in a rural area must have *qualitative* urban growth consequences." Petitioner suggests the RWL policies cross the line. Tribe Reply, at 39, *citing KCRP*, at 16. The Tribe then argues that the clustering provisions in the Snohomish County case (*Sky Valley*) are distinguishable from the RWL policies under review here because the parameters are different. *Id.*, at 49-50. Finally, Petitioner argues that the RWL policies do not encourage compact urban development or otherwise adhere to the guidance provided by the goals of the Act. *Id.*, at 52-56.

Board Discussion

Forestry activities are permissible on lands designated as "Rural" in the County's Plan. *See* RCW 36.70A.070(5)(b). However, forestry on these "wooded lands" is not entitled to the protections from encroachment of incompatible uses that attach to lands designated as forest resource lands of long-term commercial significance. *See* RCW 36.70A.170, .060, .030(8) and .020(8).

Likewise, the Act permits the County to include cluster development and density bonus incentive programs for "Rural" lands (*i.e.* in the Rural Element of the Plan), as mechanisms to provide for a variety of rural densities. *See* RCW 36.70A.070(5)(b) and .090. The County can rely on local circumstances to help shape its rural density provisions. *Id.* As articulated by the parties in briefing and at the HOM,[17] the relevant local circumstances in Kitsap County include, at a minimum: 1) a large number of nonconforming small lots in the rural area; 2) a significant number of large ownerships and large lots in the rural area; 3) ongoing forestry activities in the rural area that does not have long-term commercial significance (*i.e.*, not forest resource lands); and 4) the lack of aggregation of smaller nonconforming lots in the rural area.

As all the parties briefing this issue acknowledge, the County has been pursuing some form of incentive program in the forested portions of its rural area for some time. *See* City PHB, Tribe PHB, County Response I, Manke Response and Overton Response. There does not appear to be any dispute regarding the *need* for some type of an incentive program in light of the local circumstances found within these rural areas of Kitsap County. The RWL policies (primarily Plan policies RL-10(a) and (b) and RL-11(a through i) are the most recent product of the County's efforts to meet this need.

[17] *See* HOM Transcript, at 35, 46, 49, 55, 60-61, 65 and 75.

While the Act recognizes that the County may consider local circumstances in establishing rural densities in the Plan's Rural Element, the Act also *requires*[18] that the County "develop a written record explaining how the rural element [here how the RWL polices] harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5)(a). The Board construes and interprets this "written record explanation" requirement to be a discrete document produced by the County, which may compile record evidence to explain how the goals are harmonized. Although counsel for the County argued in briefing[19] and at the HOM[20] how the RWL policies complied with the goals of the Act, the Board finds no written record explaining how the RWL policies harmonize the goals of the Act.

Ordinance No. 311-2003, Section 5, at 12, is captioned "Additional Procedural and Substantive Findings Relating to Interim Rural Forest [*i.e.* RWL policies]." There are 12 "procedural findings" that list the dates of various meetings and hearings held on this topic; and five "substantive findings" (**SF**) that summarize the changes the BCC made to the RWL policies in response to concerns of the Planning Commission and the public. *Id.*, at 12-15. These substantive findings do not explain how the County has harmonized the goals of the Act in light of the adopted RWL policies. This is especially important since the RWL policies are establishing a permissible land use pattern that is part of the "rural character"[21] of Kitsap County. This deficiency alone leads the Board to conclude that the County has clearly erred and has not complied with the requirements of RCW 36.70A.070(5)(a). However, there are additional reasons that persuade the Board that this conclusion is correct.

It is clear that density bonuses and cluster development are permitted under the Act, but they are limited to the extent they "will accommodate *appropriate rural densities* and uses that are *not characterized by urban growth and* that are *consistent with rural character*." RCW 36.70A.070(5)(b), (emphasis supplied). The County's adoption of the RWL policies is presumed valid and the "substantive findings" of Section 5 of the Ordinance, noted *supra*, do state that the changes made by the BCC in response to the PC and public concerns "increase the level of protection of rural character and prevention of urban growth in the IRF clustering policy" [Ordinance 311-311-3003, Section 5, SF 2, at 14.] and "[amendments to the RWL policies] allow compact urban development in IRF clusters while protecting rural character and preventing urban growth in the rural area." *Id.*, SF 4, at 15.

However, Petitioners have made a *prima facia* case that the County has not overcome. The evidence supports a conclusion of error by the County. First, the City notes that the PC was concerned that no environmental review was performed on the RWL policies and

[18] The Board notes that either this provision of the Act was not placed before the *Manke* Court or it was overlooked.

[19] County Response I, at 33-37.

[20] HOM Transcript, at 56-58.

[21] *See* RCW 36.70A.030(14), quoted *supra*.

that the extent of the environmental analysis in the threshold determination for Ordinance No. 311-2003 was "[T]he amendments will not result in impacts themselves. Subsequent land use proposals will be subject to project specific review." *See* City PHB, at 17, and City Reply, at 12 *citing* Ex. 26081. This suggests that environmental impact information was lacking in the County's decision, and apparently is not anticipated until project review occurs. This is too little, too late, for a major Plan policy decision related to rural land use patterns and densities potentially applicable to almost 50,000 acres.

Second, the County acknowledges that it is uncertain what effect the RWL policies will have upon the rural area, "[Without development regulations] it is impossible to predict what will happen on the ground." County Response I, at 25, footnote 14. This also suggests that the County has not tried to determine how the incentives prescribed in the RWL policies will be received or accepted, and ultimately implemented to affect rural character and development in the rural area. Without clearly defined parameters, the Board notes that scenarios envisioned by Petitioners – the City and the Tribe – are all too plausible.

Third, Plan Policy RL-10b itself undermines the SFs conclusions in the Ordinance that indicate rural character *is* protected and urban growth prevented. It appears that the County is not that confident of its conclusions. RL-10b states, "Prior to accepting any applications pursuant to this policy, the County shall adopt development regulations that *specifically address* the criteria and objectives of the RL-11a – RL – 11-g section including but not limited to *how rural character will be preserved and urban growth in the rural area will be prevented.*" This policy is carried out in Section 10(7) of the Ordinance where County staff is directed to develop the development regulations for the RWL policies and present them to the BCC [within 9 months[22] of the effective date.] This policy supports the contention that the County is awaiting development regulations before it evaluates whether the RWL policies protect rural character and prevent urban growth in the rural area, thereby being noncompliant with the requirements of RCW 36.70A.070(5)(b).

Fourth, the County and Intervenors assert that the RWL policies provide a framework and provide policy guidance for drafting the development regulations. Yet it is not clear from the language of the policies themselves whether shorelines are limited to saltwater or marine shorelines or all shorelines including freshwater shorelines.[23] It is not clear whether the permitted 2.5 acre lots in the shoreline incentive policy is calculated based upon the entire lot or just the "shoreline preserve."[24] It is not clear whether, after 40 years, the "wooded reserve" could only accommodate the remainder of previously approved, but unused cluster development units, or whether it could provide a basis for a new cluster application.[25] Each of these "ambiguities" can directly affect the amount of

[22] The Board understands this date has been delayed pending the outcome of this matter.

[23] *See* RL-11c, and HOM Transcript, at 53, 77 and 80.

[24] *See* RL – 11c, and HOM Transcript, at 82-83.

[25] *See* RL – 11b, and HOM Transcript, at 51-53.

land open to the incentive program or how generous or stingy the incentives are. In order to adequately draft implementing development regulations these ambiguities in the "guiding framework" policies should be revised or removed.

For the reasons articulated *supra*, the Board concludes that the County's action of adopting the RWL policies [RL – 10(a) and (b), and RL – 11a through i] in Ordinance No. 311-2003 and set forth in the Errata Sheet, Specific Text Amendments, at 7-10, to Ordinance No. 311-2003, was clearly erroneous and does not comply with the requirements of RCW 36.70A.070(5)(a), (b) and (c), including the requirement that the RWL policies be harmonized with the goals of the Act. Also, because the County has not complied with RCW 36.70A.070(5)(a), the Board concludes that the adoption of the RWL policies was not guided by, and does not comply with, the noted goals of the Act – RCW 36.70A.020(1), (2), (3), (5), (8), (10), (11) and (12). The Board will remand the RWL policies as adopted in Ordinance No. 311-2003 with direction to the County to take legislative action to comply with the GMA, as interpreted in this Order. The Board will also urge the County to concurrently amend the Plan policies and develop the necessary implementing development regulations to provide certainty to all those potentially affected.

Conclusion – Legal Issue Nos. 9 and 11

The Board concludes that the County's action of adopting the RWL policies [RL – 10(a) and (b), and RL – 11a through i] in Ordinance No. 311-2003 and set forth in the Errata Sheet, Specific Text Amendments, at 7-10, to Ordinance No. 311-2003, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.070(5)(a), (b) and (c), including the requirement that the RWL policies be harmonized with the goals of the Act. Also, because the County has not complied with RCW 36.70A.070(5)(a), the Board concludes that the adoption of the RWL policies was **not guided by**, and **does not comply** with, the noted goals of the Act – RCW 36.70A.020(1), (2), (3), (5), (8), (10), (11) and (12). The Board will **remand** the RWL policies as adopted in Ordinance No. 311-2003 with direction to the County to take legislative action to comply with the GMA, as interpreted in this Order.

B. CRITICAL AREAS

The Board's PHO, as corrected,[26] set forth Legal Issue No. 25 as follows:

25. Whether the County violated section 19.100.110 of its Critical Areas Ordinance[27], and thereby failed to be guided by Goals 2, 8, 9 and 10, when it failed to consider the Ordinance's impacts on critical areas?

[26] The statement of this Legal Issue was corrected in the March 23, 2004 PHO, at 2.

[27] The Tribe never provided the Board with a copy of this provision of Kitsap County Code (**KCC**) – the County's critical areas ordinance (CAO), apparently codified in Chapter 19.100 KCC.

Applicable Law and Discussion

Position of the parties

The Tribe argues that the County did not conduct a critical area review of the new densities permitted in the Rural Wooded designation, as required by: 1) the Kitsap County Comprehensive Plan (Plan Policies CP-4, NS-26 and NS-62); 2) GMA Goals 8 and 10; and 3) RCW 36.70A.172. Tribe PHB, at 63-71.

In response, the County asserts that the Tribe never briefed the issue as posed in the issue statement, but instead asserted new allegations and arguments that the Board should not address. The County goes on to note that it is studying certain watersheds. County Response I, at 39-41.

Intervenor Overton argues that the County's critical areas ordinance applies to any development that occurs in the County, including development that occurs through the RWL incentive program. Also, Overton contends that the provisions of the incentive program are designed to keep development away from critical areas through clustered development where it will have the least impact on critical areas. Overton Response, at 14-15.

In reply the Tribe notes that it argued noncompliance with specific Plan Policies and Goals of the Act. The Tribe then asserts that the County should have undertaken and completed the studies before it adopted the Ordinance. Tribe Reply, at 57-59.

Board Discussion

The Tribe never mentions or cites section 19.100.110 of the Kitsap County Code – the County's Critical Areas Ordinance – in its PHB. Tribe PHB, at 63-71. Therefore, this portion of Legal Issue No. 25 is **abandoned**.

The Tribe refers to noncompliance with Goals 8[28] and 10[29] in its PHB. *Id.* While both goals are to provide direction in the development of Plans and regulations, as are all the GMA's goals, these goals do not impose a requirement upon jurisdictions to conduct a critical areas analysis of potential impacts of the adoption, or amendment of, GMA Plans and development regulations.

The County's own Plan Policies, as argued by the Tribe, suggest that in amending its Plan the County must consider alternatives, explain the need for the proposed changes and consider potential environmental impacts from those proposed changes. If the Tribe

[28] Goal 8 states, "Maintain and enhance natural-resource based industries, including productive timber, agricultural and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8).

[29] Goal 10 states, "Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." RCW 36.70A.020(10).

wanted to place the question of whether the County complied with its Plan Policies, as stated in its own Plan, the Tribe should have done so when it formulated the statement of Legal Issue No. 25. It did not do so. Likewise, the Tribe did not include compliance with RCW 36.70A.172, as an issue to be resolved by the Board. Therefore, the Board can not, and will not, resolve these questions. *See* RCW 36.70A.290(1).

However, the Board notes that none of the Plan Policies cited by the Tribe directs that Plan amendments be reviewed for impacts on critical areas. Additionally, this type of review (application of the CAO provisions) typically occurs during review of a project proposal. Finally, the Board notes that compliance with RCW 36.70A.172 would ordinarily be raised in the context of amendments to the County's critical areas regulations. These regulations were not altered by the County's adoption of Ordinance No. 311-2003.

Conclusions

The Board concludes that Petitioner has **abandoned** part of Legal Issue No. 25, and **failed to carry the burden of proof** in demonstrating noncompliance with the goals or requirements of the Act. Legal Issue No. 25 is **dismissed with prejudice**.

C. OFM POPULATION PROJECTIONS

The Board's PHO sets forth three Legal Issues related to OFM's population projections. They are Legal Issues Nos. 13, 23 and 24, which provide as follows:

13. ***Did the County violate RCW 36.70A.110(2) when it used the Ordinance to expand UGAs which are not based upon OFM's population projections?***

23. ***Did the County fail to comply with the consistency requirements of RCW 36.70A.100 and RCW 36.70A.210 when it adopted a population projection and allocation that contradicts County-wide Planning Policies (CPP) CPP A.2.i and A.3?***

24. ***Did the County fail to comply with the requirements of RCW 36.70A.110(2), RCW 36.70A.130 and the consistency requirements of RCW 36.70A.100 and RCW 36.70A.210 and fail to be guided by RCW 36.70A.020(1) and (2) when it allocated 10,640 of 26,790 in forecast growth to Urban Growth Areas and when it failed to consider concurrently all of its comprehensive plan amendments?***

Applicable Law

RCW 36.70A.110(2) provides in relevant part:

> Based upon the growth population projections made for the county by the office of financial management [**OFM**], the county and each city within the county shall include areas and densities sufficient to permit the urban

> growth that is projected to occur in the county or city for the succeeding twenty-year period. . . . Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.

RCW 36.70A.100 requires consistency among the plans of jurisdictions with common borders. It is generally referenced as the external consistency provision; it is set forth in full *supra*, under the Rural Wooded Lands discussion.

RCW 36.70A.210(1) provides in relevant part:

> . . . For the purpose of this section, a "county-wide planning policy" is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100. . . .

Goals 1 and 2 relate to encouraging development within urban areas and reducing sprawl; these Goals are set forth in full *supra*, under the Rural Wooded Lands discussion.

The relevant provision of RCW 36.70A.130, as suggested by Legal Issue 24, provides:

> Except as provided in (a) of this subsection, *all proposals shall be considered by the governing body concurrently* so the cumulative effect of the various proposals can be ascertained. . . .

RCW 36.70A.130(2)(b); (emphasis supplied).

Kitsap County's County-wide Planning Policy – CPP A.2.i – provides in relevant part: "[S]ufficient area must be included in the Urban Growth Area to accommodate a minimum twenty-year population forecast."

Discussion

Position of the Parties:

The Tribe argues: 1) The County's new population forecast is not "based upon" OFM's most recent forecast; 2) The County ignored new or updated information; and 3) The population projection selected is inconsistent with CPP A.2.i because it is not the "minimum" projected by OFM. Tribe PHB, at 30-38. The Tribe also implies that the population target that was not allocated in the subarea planning process to UGA expansions was automatically allocated to the rural areas. Thus, the "net cumulative effect of the Ordinance is to accommodate and encourage over sixty percent of forecast growth in rural areas." *Id.*, at 60-62.

In response the County asserts that the population target selected by the County falls within the range projected by OFM which is all that is required. County Response II, at 14. The County further asserts that the word "minimum" in CPP A.2.i means the UGAs must accommodate at least the 20-year population forecast, not the low range projected by OFM. *Id.*, at 16. The County suggests that the Tribe erroneously concludes that the remainder of the population target not allocated to the UGA expansions was allocated to the rural area. The County contends it did not allocate the population remainder anywhere. Instead the County says it has deferred allocating it, which is not prohibited by the GMA. County Response I, at 38.

Intervenor McCormick concurs with and corroborates the response set forth by the County, noting that requiring constant analysis of new data can lead to paralysis in planning and decision-making. McCormick Response, at 33-34.

Intervenor Overton asserts that the property owners of RW lands cannot be held hostage to the City of Bremerton's inability to attract population. Overton Response, at 15-16.

In reply, the Tribe re-asserts arguments made in their PHB, adding that a discretionary choice must be reasoned and not arbitrary. Petitioners suggest that the County must conduct an analysis of the process it uses, including the most current data, to select its population target. Tribe Reply, at 23-28. Petitioners also cite to cases decided prior to the 1995 legislative amendments directing OFM to prepare population forecast ranges, to support its contention that CPP A.2.i means the County's UGA must be sized to accommodate the "minimum" (low) OFM forecast. *Id.*, at 28-29.

Board Discussion:

The mandate of RCW 36.70A.110(2) is that the County designate its UGAs with enough area and density to accommodate the urban growth (*i.e.*, derived from population) that is projected to occur in the county or city for the succeeding twenty-year period. OFM is the state agency required to prepare the population projections. *See* RCW 43.62.035. In 1995, the legislature amended RCW 43.62.035 directing OFM to prepare a range of population forecasts rather than a single projection. *See* Laws of 1995, ch. 400.

Since the legislative change requiring a range of population projections, rather than a single point, the Board has determined that counties have discretion in selecting population targets for designing UGAs, so long as the population target is within the OFM population range and encourages urban development in urban areas. *See Bremerton, et al., v Kitsap County/Alpine Evergreen, et al., v. Kitsap County (**Bremerton/Alpine**)* CPSGMHB Case No. 95-3-0039c Coordinated with Case No. 98-3-0032c (**3539c**/**8332c**), Order Rescinding Invalidity in *Bremerton* and Final Decision and Order in *Alpine*, (Feb. 8, 1999), at 38.

In other words, the state, through OFM, sets the upper and lower limits of the population growth to be accommodated. Given these parameters, then the counties must: 1) select a population target that falls within the bounds of the OFM ranges; and 2) "based upon" the

selected target population, designate UGAs to accommodate that urban growth. This approach appropriately balances state interests and local discretion.

There is nothing argued by Petitioners that persuades the Board that this approach is out of balance or in need of adjustment. The County is planning to accommodate 319,017[30] people by the year 2017; the 2002 OFM forecasts for 2017 range from 250,305 (low), 291,949 (middle) and 354,601 (high). *See* Ordinance No. 311-2003, Finding No. 13 and 16, and Tribe PHB, at 37. The County's selected population target falls within the ranges projected by OFM. The County's process for selecting the target population was a rational process and was based upon the data available at the time. The selected population target is not an irrational choice and is within the County's discretion. Therefore, the Board concludes that the population target selected by the County [319,017 by 2017] is within the range of OFM projections and complies with the requirements of RCW 36.70A.110(2).

Likewise, the Board cannot read CPP A.2.i in the way the Tribe proposes. To do so is directly counter to the 1995 legislative amendments directing range forecasts by OFM. Prior to this amendment, there was only one OFM projection. That projection was both a floor and a ceiling; counties had no choice[31] but to accommodate the single point population projection of OFM in sizing their UGAs. This is what the Tribe is advocating; this is what the legislature has clearly rejected. The Board concludes that the County's selected target population for 2017 is consistent with CPP A.2.i, and therefore complies with RCW 36.70A.210 and .100.

Petitioners offer no discernable argument as to compliance with the concurrent review requirements of RCW 36.70A.130(2)(b). The Board notes, however, that the adoption of Ordinance No. 311-2003 is the product of the County's 2003 annual amendment review process. This Ordinance includes numerous amendments, many of which were challenged by Petitioners, and each of the amendments adopted in this single Ordinance were considered concurrently. Therefore, Petitioners have failed to carry their burden of proof in demonstrating noncompliance with the requirements of RCW 36.70A.130, as referenced in Legal Issue No. 24.

Finally, the Board is not persuaded by the implied argument of the Tribe that the County has assigned the unallocated portion of the target population used for the subarea planning process to the rural areas. The Tribe points to nothing in the GMA that requires the entire population projection of OFM to be directed only to urban areas. Petitioners have failed to carry their burden of proof on this issue.

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[30] The 2000 Census established the total population for Kitsap County as 231,969. See Tribe PHB, at 36, *citing* Ex. 23598, at 8.

[31] The Board recognizes that RCW 36.70A.280(1)(b) allows appeals to the Board of the OFM population projections.

Conclusions

The Board concludes that the population target selected by the County [319,017 by 2017] is within the range of OFM projections and **complies with** the requirements of RCW 36.70A.110(2). The Board also concludes that the County's selected target population for 2017 is consistent with CPP A.2.i, and therefore **complies with** RCW 36.70A.210 and .100. Petitioners **have failed to carry their burden of proof** in demonstrating noncompliance with RCW 36.70A.130(2)(b) or the implied rural allocation suggestion in Legal Issue No. 24.

D. URBAN GROWTH AREA EXPANSIONS AND SUBAREA PLANS

The Board's PHO sets forth Legal Issues 12, 14 and 15 as follows:

12. Did the County violate RCW 36.70A.110 in using the Ordinance to expand UGAs?

14. Did the County violate RCW 36.70A.110(1), 36.70A.070 ("internally consistent document"), RCW 36.70A.080 (2) (subarea plans to be consistent), and 36.70A.210 when it included within the expanded UGAs land located outside of a city which is not already characterized by urban growth or adjacent to such area contrary to CPP A.2.c. and Comprehensive Plan policy UGA-2?

15. Did the County violate RCW 36.70A.070 ("internally consistent document"), RCW 36.70A.080(2) (subarea plans to be consistent with comprehensive plan), and RCW 36.70A.210(1) by adopting the Ordinance which expanded UGAs contrary to the locational criteria of the Countywide Planning Policies and Comprehensive Plan?

Applicable Law

36.70A.070 provides in relevant part:

> The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

36.70A.080 provides in relevant part:

> (2) A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan.

36.70A.110 provides in relevant part:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.
>
> (2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.
>
> Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. In the case of urban growth areas contained totally within a national historical reserve, the city may restrict densities, intensities, and forms of urban growth as determined to be necessary and appropriate to protect the physical, cultural, or historic integrity of the reserve. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.
>
> . . .
>
> (3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.
>
> …

> (6) Each county shall include designations of urban growth areas in its comprehensive plan.
>
> . . .

36.70A.210 provides in relevant part:

> (1) The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For the purposes of this section, a "county-wide planning policy" is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100. Nothing in this section shall be construed to alter the land-use powers of cities.

1. General Discussion

The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion as well as to the initial UGA designation. RCW 36.70A.110(1) specifically contemplates that UGA boundaries may expand over time to allow for additional urban development, and it specifies the locational criteria that limit that expansion. A UGA may include an area not in a city only if that area already is characterized by urban growth, is adjacent to an area characterized by urban growth, or is a designated fully-contained community. *See Ass'n of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Final Decision and Order, (June 3, 1994), at 48.

A UGA must provide for sufficient area and densities to accommodate the urban growth that is projected for the succeeding 20-year period. RCW 36.70A.110(2). This subsection specifically contemplates that UGA boundaries may expand over time as necessary to meet population projections, imposing another limitation on their expansion. Counties must review, and if necessary, revise their UGAs at least every ten years to accommodate urban growth projected for the succeeding 20 years. RCW 36.70A.130(3). A *county-wide* land capacity analysis must accompany these statutorily mandated periodic revisions of UGAs. *Master Builders Ass'n v. Snohomish County*, CPSGMHB Case No. 01-3-0016, Final Decision and Order, (Dec. 13, 2001), at 9.

An expansion of a UGA is essentially a redesignation, which must be consistent with the requirements of RCW 36.70A.110. The Board has made clear that changes in the size of UGAs must be supported by land use capacity analysis and the County must "show its work:" "If UGAs are altered and challenged…this Board requires an accounting to support the alteration." *Id, at 12*. "The Board has been clear that Counties must show their work when *altering* UGA boundaries." *Id.*, at 22 (emphasis in original). *See: Kitsap Citizens, et al. v. Kitsap County (**Kitsap Citizens**)*, CPSGMHB Case No. 00-3-

0019c, Final Decision and Order, (May 29, 2001), at 12-16; and *Hensley (IV) v. Snohomish County*, CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001), at 29-34.

In *Kitsap Citizens*, the Board explained that when UGA expansions are challenged, the record must provide support for the actions the jurisdiction has taken; otherwise the actions may have been determined to have been taken in error – i.e., clearly erroneous. Accordingly, counties must "show their work" when a UGA is expanded. *Kitsap Citizens*, FDO, at 12-16.

The land capacity analysis required in RCW 36.70A.110(1) and (2), now underscored by the buildable lands reports required by RCW 36.70A.215, is a vital component of the work that must be shown. *Director of the State Department of Community, Trade and Economic Development v. Snohomish County,* **(*CTED I*)**, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), at 20-22.

2. ULID #6 UGA

The Action

Kitsap Ordinance No. 311-2003 adopted the South Kitsap UGA/ULID #6 Sub-Area Plan as Attachment 6 to the Ordinance. The document is a sub-area plan and Urban Growth Area (UGA) for a portion of South Kitsap County that encompasses the existing South Kitsap UGA (i.e., the McCormick Woods and McCormick North areas), as well as the McCormick West portion of the South Kitsap Urban Joint Planning Area (UJPA), a total area of 2,370 acres. Ordinance No 311-2003 and this sub-area plan expand the South Kitsap UGA to encompass the McCormick West portion of the South Kitsap UJPA, an expansion of approximately 619 acres. Sub-Area Plan at *ii* and 23.

The sub-area encompasses the entirety of Utility Local Improvement District (ULID) #6 in unincorporated Kitsap County, and involves land immediately adjacent and to the south of a portion of the Bremerton UGA, and in the proximity to the City of Port Orchard. The Sub-Area Plan designates areas for urban residential uses, as well as business-park, neighborhood commercial, Urban Village Center, public facility and recreational uses. Sub-Area Plan at *ii*.

a. Locational Issues

Positions of the Parties

The Tribe asserts that Kitsap did not use the criteria required by RCW. 36.70A.110 when developing the three UGA expansions adopted in Ordinance No. 311-2003. This failure resulted in the UGAs being expanded to include lands which were not already characterized by urban growth nor adjacent to such lands, while lands which were already characterized by urban growth were rejected. Tribe PHB, at 38-39. The Tribe asserts

that the County applied the GMA criteria in the 1998 Comprehensive Plan under Policy UGA-2 and CPP A.2.c when they allocated population to Urban Growth Areas using a three tiered prioritization: first to currently urbanized areas with existing service capacity to accommodate future growth (Tier 1); second to currently urbanize areas where a combination of existing and planned services provide capacity to accommodate future growth (Tier 2); third to lands adjacent to such currently urbanized and serviced areas (Tier 3). *Id.,* at 40-41.

The Tribe asserts that in allocating post-2012 growth in South Kitsap County in 2003, the County did not use the tiered prioritization system required by the Act and by County Policy, but substituted a prioritization system established in a 2001 Memorandum of Agreement (MOA) between the County and Port Orchard. The Tribe argues that the MOA prioritization system or "phasing" resulted in the inclusion of McCormick West, vacant Tier 3 lands, in the ULID #6 UGA, while consideration of an existing medium density neighborhood located near shopping and employment, Tier 1 or 2 lands, was postponed to the third phase of the UPJA planning process. Also, Kitsap has shown no work to document unusual circumstances that would justify including such lands in a UGA. *Id* at 42-44.

In response, Kitsap asserts that CP UGA-2 and CPP A.2.c do not establish locational criteria for UGAs. The location of UGAs is within the County's discretion under the provisions of RCW.36.70A.3201. County Response II, at 19. Comprehensive Plan Policies UGA-6 through UGA-13 are the basis for the ULID #6 planning process. *Id.,* at 20. Kitsap argues that RCW 36.70A.110(1) does not apply to expansion of existing UGAs. *Id.,* at 22-25. Kitsap argues in the alternative that the inclusion of ULID #6 in the South Kitsap UGA is consistent with RCW 36.70A.110(1) because it is served by public sewers, and is adjacent to McCormick Woods, an area characterized by urban growth. *Id.,* at 25.

In response to the Tribe, Intevenor McCormick asserts that McCormick West is not a lower tier area than other UJPA areas in South Kitsap County. McCormick West is the only UJPA area with existing sewer service, and there is no plan to extend sewer service to the other areas. McCormick Brief, at 37.

In reply, the Tribe argues that neither a Memorandum of Agreement nor a UJPA can override GMA locational criteria. Tribe Reply, at 34. And neither the MOA nor the UJPA presumed that UGA expansions would occur as a result of those planning processes. *Id.*

Board Discussion

RCW 36.70A.110(3) provides that local governments are to locate urban growth first in areas already characterized by urban growth that have adequate existing public facilities and services to serve new development, second in areas where urban services can be provided efficiently, and third in the remaining areas of UGAs. These priorities pertain

to the sequence of development within UGAs rather than to the criteria for expanding UGAs.[32]

RCW 36.70A.110(1) provides that a UGA may include an area not in a city only if the area already is characterized by urban growth, is adjacent to an area characterized by urban growth, or is a designated fully-contained community. These are the criteria applicable to a UGA expansion.

The ULID # 6 UGA expansion area, McCormick West, is adjacent to McCormick Woods, an area which is developing at a residential density of 4.41 dwelling units per acre. BLR, at 54. McCormick Woods has existing urban services including water service[33], sewer service[34], and curbside solid waste and recycling service[35]. This UGA expansion area is adjacent to an area characterized by urban growth.

Countywide Planning Policy (CPP) A.2.c provides:

> 2. The following countywide policies are related to the process and criteria for establishing and amending Urban Growth Areas in Kitsap County:
>
> …
>
> c. Areas designated for urban growth should be determined by the existing development pattern, residential densities, and the ability of the appropriate service provider to provide a full range of activities.

Kitsap Countywide Planning Policies, at 4 (2001).

Comprehensive Plan Policy (CP) UGA-2 provides:

> The unincorporated Urban Growth Area has been defined by allocating population according to the factors and priorities identified in the Growth Management Act: 1) currently urbanized areas with existing service capacity to accommodate future growth; 2) currently urbanized areas where a combination of existing and planned services provide capacity to accommodate future growth; and 3) lands adjacent to such currently urbanized and serviced areas. The Urban Growth Area has also been defined so as to identify to the extent possible a contiguous urban area within which most growth will be encouraged to occur.

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[32] See *Hensley et al., v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Final Decision and Order (FDO), (Sep. 22, 2003), at 26; And *Citizens for Responsible Growth, et al. v. Snohomish County*, CPSGMHB Case No. 03-3-0013, FDO, (Dec. 8, 2003), at 11.

[33] South Kitsap UGA/ULID #6 Sub-Area Plan, Figure 7.1 at 44.

[34] *Id* at 48 – 51.

[35] *Id* at 51.

Kitsap County Comprehensive Plan, at 14-15 (2002).

These policies are consistent with the provisions of RCW 36.70A.110. However they do not require that the priorities of RCW 36.70A.110(3) be used as criteria for selecting UGA expansion areas. CPP A.2.c. is advisory. CP-UGA-2 indicates that the unincorporated Urban Growth Area of the county has been defined by using the factors and priorities identified in the GMA, which include the priorities in RCW 36.70A.110(3), and the additional consideration of identifying a contiguous urban area within which most growth will be encouraged to occur. This policy does not mandate criteria for identifying areas for expansion of UGAs.

The Kitsap County Comprehensive Plan established Urban Joint Planning Areas (UJPA) and a process for coordinated planning between the County and cities to resolve outstanding land use and capital facilities issues in areas designated Urban Reserve or Urban Industrial Reserve on the 1998 Land Use Plan Map. Comprehensive Plan (CP) at 16-18. The UJPA process addresses the location and amount of land outside of designated UGAs that may be needed to support future growth. The process provides that interlocal agreements between Kitsap County and a city will determine how these areas are planned and serviced. The UJPA process, including the MOA between the County and Port Orchard, was utilized in the preparation of the South Kitsap UGA/ULID #6 Subarea Plan adopted by Ordinance No. 311-2003. *Id.*, at 17.

Conclusion

The GMA, CPP A.2.c and CP UGA-2 do not require the three tiered prioritization process espoused by petitioner for the designation of UGA expansion areas. The ULID #6 UGA expansion is adjacent to an area characterized by urban growth as required by RCW 36.70A.110(1). Petitioner has not shown the location of ULID #6 UGA expansion area to be inconsistent with the Act, with Countywide Planning Policies or with Kitsap Comprehensive Plan policies.

b. Sizing Issues

Kitsap Ordinance No. 311-2003 adopts a population allocation of 6,400 to the ULID #6 Sub-Area. [Ordinance No 311-2003, Section 10 (5)]. The area of the UGA expansion is approximately 619 acres. Sub-Area Plan at *ii*.

Petitioners claim that the ULID #6 UGA expansion does not comply with the provision of GMA for three reasons: The UGA was expanded in lieu of reasonable measures to accommodate projected growth within existing UGA's. The expansion was not supported by a countywide land capacity analysis. The expansion was predicated on a population projection and allocation that were not based on OFM forecasts. OFM population forecast issues are addressed in Section C, *supra*. Reasonable measures issues are addressed in Section F, *infra*. Here we address the issue of a countywide land capacity analysis in relation to the ULID #6 UGA expansion.

Positions of the Parties

The Tribe argues that the expansion of an individual UGA must be based on a countywide land capacity analysis rather than an analysis focused on a subarea of the county. Tribe PHB at 20-22. The Tribe asserts that sizing of the ULID #6 UGA Expansion was not based on a countywide land capacity analysis. *Id* at 23-24.

In response Kitsap and McCormick assert that the sizing of the ULID #6 UGA was based on a countywide land capacity analysis included in the 1998 Comprehensive Plan; and the expansion of that UGA is based on a land capacity analysis using the same methodology used in the 1998 analysis. Kitsap and McCormick argue that the act does not require an update of the countywide land capacity analysis each time the county considers an individual UGA expansion. County Response I, at 28-30; McCormick Response, at 27-30.

In reply the Tribe asserts that applying the land capacity analysis methodology of the 1998 Comprehensive plan to this individual subarea does not meet the requirement of the Act for a countywide land capacity analysis. Tribe Reply at 17-20.

Discussion

The County applied the Comprehensive Plan Policies for Urban Growth Areas, including the Urban Joint Planning Area Policies, in developing the South Kitsap UGA/ULID #6 Sub-Area Plan. Comprehensive Plan at 14–22; Sub-Area Plan at 3[36]. The ULID #6 UGA Expansion area was identified in the Comprehensive Plan as an "Urban Reserve" area to be considered for potential addition to the UGA to reflect population updates for 2013 - 2017. Comprehensive Plan at 14, 17. The process and methodology which are the basis for the forecast of county population increase in 2013-2017 and the allocation of 6,400 of that increase to ULID #6 are set forth in Section 7 of Ordinance No. 311-2003. A "Population Holding Capacity Analysis for Kitsap UGA/ULID #6 Subarea Plan Alternatives" is included as Appendix E to the Sub-Area Plan. The application of the holding capacity analysis and the population allocation within the ULID #6 Subarea is described in the Subarea Plan at 68-70.

Conclusion

The County has shown the work it has done as a basis for the decision to expand the ULID #6 UGA. The work included a land capacity analysis applying the methodology used in the 1998 countywide land capacity analysis. The Comprehensive Plan itself directed the utilization of sub-area analysis in the UJPA process of evaluating potential expansion of individual UGAs to accommodate 2013-2017 population projections and allocations. Petitioner has not shown the size of the ULID # 6 UGA expansion area to be inconsistent with the Act.

[36] See Section 9.4 for description of the Sub-Area plan compliance with Comprehensive Plan.

Conclusion – ULID #6 UGA

The Board concludes that Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with the GMA. Petitioners challenge to the South Kitsap UGA/ULID #6 Sub-Area Plan, as implied in Legal Issue Nos. 12, 14, and 15, is **dismissed**.

3. SOUTH KITSAP INDUSTRIAL AREA (SKIA) UGA

The Action

Ordinance No, 311-2003, Section 10(4), at 39, adopts the SKIA Subarea Plan (**SKIA Plan**), Attachment 4. The SKIA Subarea Plan is accompanied by SKIA development regulations to implement the Subarea Plan. Ordinance, Attachment 5.

The County's 1998 Plan established a special land use overlay entitled "Urban Joint Planning Area" (**UJPA**) which was applied to the SKIA area. UJPA meant that the area was considered potentially suitable for inclusion within a UGA, but that further coordinated planning was needed to resolve outstanding land use and capital facility issues. The underlying Plan designation for the SKIA UJPA was Urban Industrial Reserve. *Id*, Section 6, Substantive and Procedural Findings Relating to the South Kitsap Industrial Area, A.1, at 16.

Prior to adoption of this Ordinance, the unincorporated SKIA UGA totaled 1690 acres and included "Airport" and "Industrial" land use designations. SKIA Plan, at 34. The SKIA UJPA included the 1,690 acres of the UGA and an additional 1,675 acres with land use designations of "Industrial/Urban Reserve," or "Industrial/Urban Reserve with a Mineral Resource Overlay." The combined acreage within the SKIA UJPA is 3,365 acres. These areas are generally located southeast and northeast of the SKIA UGA. *Id.* The adjustments to the SKIA UGA boundary are as follows:

> - On the Southeast boundary of SKIA, approximately *130 acres are recommended for removal* from the SKIA UGA. These properties fall east of an existing Bonneville Power Administration Easement which creates a disconnect between the western and eastern portions of the subarea. The properties would be designated as Rural Wooded (RW).
> - Adjacent to SKIA's current northeast boundary, approximately *110 acres are being recommended for inclusion* in the final SKIA UGA. This recommendation is based upon parcel size, current uses and the suitability of these parcels for Business Center Uses.

Id., (emphasis supplied). Thus, the SKIA UGA, as modified by Ordinance No. 311-2003 goes from a total acreage of 1690 acres to 1670 acres, *a net reduction in size of 20 acres*. However, the boundaries of the SKIA UGA are shifted, deleting some area from the southeast portion and adding some area to the northeast portion, adjacent to the City of

Bremerton's city limits. Additionally, it is significant to note that there are no residential land use designations within the SKIA UGA or for that matter the SKIA UJPA. Therefore, a land capacity analysis to determine residential capacity is not material in evaluating this UGA. Given this "SKIA UGA *expansion*" action of the County, what is the basis of Petitioners' challenge?

Position of the Parties

Petitioner Suquamish Tribe argues under Legal Issue 12 that the expansion of the SKIA UGA does not comply with the Act's goals and requirements, because: 1) Kitsap County failed to first try reasonable measures to accommodate growth within existing UGAs; and 2) that expansion was not supported by a county-wide land capacity analysis as to their sizing. Tribe PHB, at 18-30. As they relate to the SKIA UGA, these arguments are further broken down, and address more specific elements of .110, under Issues 17 and 18 as discussed *supra*. *Id.*

In brief, Petitioner claims that 1) the County has neither identified nor implemented reasonable measures to accommodate urban growth forecasts; 2) the GMA requires consideration of a county-wide land capacity analysis for expansions of UGAs; 3) Kitsap County policies express a commitment to base UGA size and location on a county-wide land capacity analysis; 4) the UGA expansions in this case were based on site-specific land capacity analyses rather than a single county-wide land capacity analysis; 5) the County did not use the most recent and comprehensive data available, including the BLR; and 6) the County did not prepare a commercial/industrial land capacity analysis to support non-residential UGA expansions. *Id.*, at 18-30; and Tribe Reply, at 15-23. Petitioner argues that the Board should find the expansions inconsistent with the requirements of both RCW 36.70.215 and .110. Tribe's PHB, at 20. Petitioner points to previous Board decisions discussing the relationship between these two sections of the Act in defense of the assertion that a land capacity analysis is 1) required by .110, and 2) must be county-wide. *Id.*, at 20-21.

Under Issues 14 and 15, the Tribe contends that the land added to the SKIA UGA does not meet the requirement of being already characterized by urban growth or adjacent to such territory. *Id.*, at 45. Petitioner backs up this contention by quoting the Subarea Plan's description of the new SKIA UGA in general as "the largest undeveloped Industrial/Industrial Reserve property in Kitsap County." *Id.* Petitioner also argues that the County failed to undertake the locational analysis required by RCW 36.70A.110(1) and points to the lack of discussion of locational criteria within the SKIA Subarea Plan as evidence of the County's violation of .110. *Id.*, and Tribe Reply, at 37-38.

Respondent Kitsap County assumes that Legal Issue 12 is incorporated into discussion of RCW 36.70A.110(1) and .110(2), under Legal Issues 13 and 14, due to Petitioner's lack of specificity in briefing this Issue. County Response II, at 12. Respondent contends that Petitioners have abandoned Issues 14 and 15 as they relate to the SKIA Subarea due to inadequate briefing. Specifically, Respondent claims that because Petitioner has the burden of proof, and because the Board uses a "clearly erroneous" standard of review,

Petitioners cannot simply argue a lack of evidence in the record on a particular issue. *Id.*, at 17-18.

Intervenor Port of Bremerton states that it relies "primarily" on Kitsap County to address the legal issues concerning the SKIA Subarea Plan. Port Response, at 2. Intervenor also argues that the Tribe's brief on the SKIA Subarea Plan Issues contain no legal or factual basis, and notes that Petitioner City of Bremerton does not challenge the SKIA Subarea Plan. *Id*.

Intervenor McCormick Land Company argues that, contrary to Petitioner's assertion, a land capacity analysis was conducted for the SKIA Subarea Plan. McCormick Response, at 35. Intervenor quotes the SKIA Plan:

> Industrial Land Capacity
> This subarea plan must conform to the Comprehensive Plan's additional intent to set aside sufficient Industrial zoned land to absorb projected growth and provide options for siting economic development within SKIA. The methods and standards used in this plan for calculating gross acres relative to anticipated jobs are the same as applied in the 1998 Comprehensive Plan. For a more complete discussion about Industrial Land Capacity in Kitsap County, please see Appendix C.[37]

Id., and SKIA Plan, at 27.

Intervenor requests that the Board rule that Petitioners have failed to meet their burden of proof for Legal Issues 12, 14, 15, and 16 and to dismiss these claims. *Id.*, at 40.

Board Discussion:

Based upon the Legal Issues framed by Petitioner, the Board's understanding of the basis for Petitioners' challenge to the SKIA Subarea Plan is that the SKIA UGA was expanded and that that UGA expansion did not comply with the GMA provisions noted in the Legal Issues quoted *supra*. Petitioners neglected to point out to the Board the magnitude of the expansion or the location of the expansion to the SKIA UGA. The Board's review of the Subarea Plan itself indicates a *net reduction in the size of the SKIA UGA*, thereby undermining any "sizing of the UGA" argument Petitioner could have presented. Additionally, the change in the SKIA UGA is devoted to commercial and industrial land uses, not residential. Nonetheless, as Intervenor McCormick points out, the SKIA Subarea Plan is accompanied by an Industrial Land Capacity discussion and Appendix C. According to the Plan, this analysis is based upon the same methodology as the county-wide land capacity analysis[38] done for such lands in designating the 1998 UGAs.

[37] Appendix C to the SKIA Subarea Plan was not included among the Core Documents provided to the Board.

[38] The Board notes that even the August 2002 Buildable Lands Report indicates that the Commercial and Industrial land capacity analysis, assessing employment targets, is done on a county-wide basis, thereby undermining Petitioners' claim. *See* BLR, at 69.

Petitioner never references or argues about the adequacy of the SKIA Subarea Plan land capacity analysis.

Further, even though the SKIA UGA was reduced in size, the location of the deletions and additions to the UGA were adjusted. However, where these additions and deletions occurred was not referenced or argued by Petitioners. Absent any reference to the specific locations of the additions, and any argument as to why expansions in these areas do not meet the locational criteria of RCW 36.70A.110(1) or (3), there is no basis for the Board to address this issue. The Board's own review of the Subarea Plan and the Ordinance findings suggests that the area added to the SKIA UGA was in close proximity to, if not adjoining, the Bremerton city limits. Petitioners would be hard pressed to persuade the Board that the location of this UGA addition did not comply with the locational requirements of RCW 36.70A.110.

Conclusion – SKIA UGA

The Board concludes that Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with the GMA. Petitioners' challenge to the SKIA Subarea Plan, as implied in Legal Issue Nos. 12, 14 and 15 is **dismissed**.

4. KINGSTON UGA

The Action:

Kitsap Ordinance No. 311-2003, Section 9, at 32-38, adopted the Kingston Subarea Plan (**Kingston Plan**) as Attachment 8 to the Ordinance. The Kingston Plan adds approximately 400 acres to the 744 acres of the Kingston UGA. The Kingston Plan erroneously states that the UGA is being expanded by 1,165 acres. Kingston Plan, at ii. This was corrected after the HOM by letter from counsel for the County in response to the Board's questions at the hearing, stating that the expansion is approximately 400 acres.[39]

In adopting its 1998 Comprehensive Plan and designating UGAs, Kitsap County had created a further planning process for the Kingston area, designed to refine and extend the Kingston UGA. A subarea planning process, building on the Kingston Community Design Study (KCDS) begun in 1992, was established to complete community consideration of goals and policies for Kingston's growth and development. Kingston Plan, at 4-1. The KCDS Steering Committee was charged with developing and analyzing alternative UGA configurations to accommodate an additional population of 0-3000 by 2017. *Id.*, at 4-5. The UGA was to be no smaller than the boundaries adopted in the 1998 County Comprehensive Plan. *Id.*, at 4-3.

[39] Transcript, at 160 and 192; Letter from Samuel Plauche for Kitsap County to Bruce Laing (Letter to PO Laing), June 17, 2004.

Four UGA alternatives and a "no-action" alternative were considered by the Steering Committee. *Id.*, at 4-7 to 4-8. The preferred alternative expands the Urban Growth Area northwest of Kingston to include large school district properties -- an existing middle school and a proposed high school site -- which the Steering Committee foresaw as incorporating desired library, recreation facilities and community center. Also included are park lands and environmentally important waterways – lake and creek – identified as opportunities for preservation and open space. The school properties, parks and open space account for at least half of the 400 acres added to the Kingston UGA. *Id.*, Appendix B, Figures 3.11 and 4.2. The Kingston Plan references plans by the utilities, school district, and other responsible agencies for provision of water, sewer and other urban service in the expanded UGA. *Id.*, chapter 8. A small number of intervening residential properties between the school site and the current UGA boundary are to be up-zoned for higher density. *Id.*, at 6-10, 6-12.

The Kingston Subarea Plan was endorsed by the Kitsap County Planning Commission and adopted by the County in the Ordinance. Ordinance, Section 9, at 32-37. The Commissioners then assigned a population growth allocation of 640 for the expanded Kingston UGA. *Id.*, at 36.

Position of the Parties

With respect to Legal Issue 12, the Tribe contends that the County's adoption of the Kingston Subarea Plan and UGA expansion was contrary to RCW 36.70A.110 because the 1,165 acres apparently added to the UGA to accommodate a population of 640 extends growth at a density far below requirements for urban development. Tribe PHB, at 25. In fact, the Tribe asserts, at minimum urban densities of 4du/acre, the existing UGAs already have excess capacity; thus no expansion is justified. *Id.*, at 28.

Addressing Legal Issues 14 and 15, the Tribe contends that the Kingston UGA expansion was adopted without regard to the locational criteria of RCW 36.70A.110(3) and CPP UGA-2 in that (1) the Kingston Plan lacks discussion indicating how the locational criteria apply to each of the plan alternatives; (2) there is no information in the record demonstrating that the added lands are "already characterized by urban growth" or adjacent to such lands; and (3) the parcel map indicates that the "area added to the UGA consists of very large parcels which are apparently vacant." *Id.*, at 44.

The County replies that the Tribe's briefing with respect to the Kingston UGA expansion is so cursory as to constitute abandonment of the issue. County Response II, at 17. Alternatively, the County states that the Tribes' citation to absence of evidence in the record concerning application of statutory size and locational criteria to the Kingston Plan amounts to an impermissible attempt to shift the burden of proof to the County. *Id.*, at 18. As to the UGA size, the County asserts that the Kingston Plan was "sized according to a land capacity analysis approved by this Board," citing *Bremerton/Alpine*. *Id.*, at 48. Further, the County points to an updated holding capacity analysis for each of the Kingston alternatives. Kingston Plan, Appendix E (dated 8/1/2003).

Furthermore, the County argues that the locational criteria of RCW 36.70A.110(1) only apply to the initial designation of UGAs, not to subsequent UGA expansions. The County invites the Board to reconsider its reasoning on this issue in *1000 Friends v. Snohomish*. County Response II, at 22-25.

Board Discussion

As to the issue of the size of the Kingston UGA, the Tribe's analysis was distorted by an error on the first page of the Kingston Subarea Plan. The Plan states an UGA expansion of 1,165 acres. Kingston Plan, at ii. After briefing and Hearing on the Merits, the County corrected this number to 400 acres. Letter to PO Laing, June 17, 2004. The KCDS Steering Committee planned and reviewed alternatives for an increased population of up to 3000; the Planning Commission recommended a population allocation of 2000; the County Commissioners adopted an allocation of 640. Ordinance, Section 9. A detailed Holding Capacity Analysis dated August 1, 2003 provided high and low build-out projections for each of the alternatives considered by the KCDS Steering Committee and Planning Commission. This formed the basis for the Kingston UGA population allocation. Kingston Plan, Appendix E.

The Board finds that the County "showed its work" sufficiently with respect to land capacity. The Tribe has not met its burden of challenging this work and putting the size of the UGA in issue.

As to the locational criteria, the Board rejects the County's argument that RCW 36.70A.110 only applies to initial UGA designations. *See* discussion, *supra*.

In fact, the Kingston Plan acknowledges the "specific guidelines" for UGA designation in RCW 36.70A.110 as restated in CPP UGA-2 and states: "This criteria and policy are included in the analysis for the alternatives associated with this plan." Kingston Plan, at 10-5, 6-1.

The Ordinance makes the following findings regarding the Kingston Subarea Plan:

> 2) The UGA and Sub-Area Plan attached hereto as Attachment 8 represents a logical extension of the existing UGA boundary based upon:
>
> a) The population allocation of 0-3000;
>
> b) Ability to extend urban services such as water and sewer;
>
> c) Protection of critical areas adjacent to and within the Kingston Sub-Area;
>
> d) Inclusion of public facilities such as schools and parks; and
>
> e) A balance of the input received from the overall community.
>
> ….
>
> 4) Based upon the foregoing findings, the Board finds that the proposed Kingston Sub-Area Plan is consistent with the 13 statewide planning goals contained within the Growth Management Act (RCW 36.70A.020). The

> Kingston Sub-Area Plan would encourage development in areas where adequate public facilities and services exist and can be provided in an efficient manner.

Is the Tribe's bare assertion that the County failed to apply the statutory locational criteria, together with the fact of undeveloped large parcels, sufficient to shift the burden of proof to the County? The Board's review of this subarea plan notes that the Kingston UGA expansion includes several large parks and three large school district properties, together comprising over half of the new acreage. *See* Kingston Plan, Appendix B, Figures 3.1 and 4.2. The GMA expressly allows inclusion of open space, RCW 36.70A.110(2), and the Board has allowed UGA policies to include accommodation of school sites.[40] Thus, large undeveloped parcels in the new UGA would not *per se* invalidate UGA designation. Without more, the Board declines to shift the burden to the County.

The Tribe has not met its burden of putting the UGA locational criteria in issue with respect to the Kingston expanded UGA. The County, however, is on notice that this Board will continue to require the locational criteria of RCW 36.70A110(1) to be applied whenever a UGA is created, modified, or expanded.

Conclusion – Kingston UGA

The Board concludes that Petitioners have **failed to carry the burden of proof** in demonstrating noncompliance with the GMA. Petitioner's challenge to the Kingston Subarea Plan, as implied in Legal Issues 12, 14, and 15 is **dismissed**.

E. IMPLEMENTATION

This Legal Issue only goes to the implementing development regulations adopted along with the ULID #6 and SKIA Subarea Plans.

The Board's PHO sets forth Legal Issue No. 26 as follows:

> ***26. Are the development regulations adopted pursuant to the Ordinance to implement the Ordinance's Comprehensive Plan amendments inconsistent with the Act's requirements to the extent that the Comprehensive Plan policies are found to violate the Act?***

[40] *Director of the State Department of Community, Trade and Economic Development v. Snohomish County* (**CTED**), Final Decision and Order (Mar. 8, 2004), at 28, noting that such extensions should be "limited and rare."

Applicable Law

RCW 36.70.040 requires that a jurisdiction's development regulations be consistent with, and implement, the jurisdiction's Comprehensive Plan. As the Board understands the briefing of Petitioners, this Legal Issue only goes to the implementing development regulations adopted along with the ULID #6 and SKIA Subarea Plans.[41]

Discussion

SKIA and South Kitsap/ULID #6 Subarea Plans and Implementing Development Regulations:

The premise underlying Petitioners' arguments on this Legal Issue is, that if the Board finds the provisions of the Subarea Plans noncompliant with any of the goals or requirements of the Act, the implementing regulations that implement those allegedly noncompliant provisions must also be noncompliant. Section 10(4), of Ordinance No. 311-2003 adopted the SKIA Subarea Plan (Attachment 4) and development regulations to implement that Subarea Plan (Attachment 5). Section 10(5) of the Ordinance adopted the South Kitsap/ULID #6 Subarea Plan (Attachment 6) and development regulations (Attachment 7). As discussed supra under both the SKIA UGA and ULID #6 UGA the Board concluded that Petitioner had failed to carry the burden of proof in demonstrating noncompliance with the requirements of the Act as stated in Legal Issue Nos. 12, 14, and 15; consequently, Petitioners claims were dismissed. The Board did not find noncompliance. Therefore, Petitioners claim as presented in Legal Issue No. 26 is also **dismissed**.

Conclusions

Regarding Petitioners challenge to whether the SKIA development regulations are consistent with, and implement, the SKIA Subarea Plan, the Board has concluded that Petitioner **failed to carry the burden of proof** in demonstrating noncompliance with the Act. Absent a finding of noncompliance the Board need not address this Legal Issue as it relates to SKIA, therefore, as to the SKIA Subarea Plan and development regulations, Legal Issue 26 is **dismissed**.

Regarding Petitioners challenge to whether South Kitsap/ULID #6 development regulations are consistent with, and implement, the South Kitsap/ULID #6 Subarea Plan, the Board has concluded that Petitioner **failed to carry the burden of proof** in demonstrating noncompliance with the Act. Absent a finding of noncompliance the Board need not address this Legal Issue as it relates to South Kitsap/ULID #6, therefore, as to the South Kitsap/ULID #6 Subarea Plan and development regulations, Legal Issue 26 is **dismissed**.

[41] There were no development regulations adopted to implement the Rural Wooded Land policies, nor were there any development regulations adopted to implement the designations for the Kingston UGA expansion.

F. BUILDABLE LANDS AND REASONABLE MEASURES

The Board's PHO sets forth Legal Issue Nos. 17, 18, 19, 20 and 21 as follows:

17. ***Did Kitsap County fail to comply with RCW 36.70A.215 and RCW 36.70A.110 when it used the Ordinance to expand urban growth areas despite the finding in its Buildable Lands Report that sufficient capacity exists within existing UGAs to accommodate projected growth?***

18. ***Did Kitsap County fail to comply with RCW 36.70A.215 and RCW 36.70A.110 when it used the Ordinance to expand urban growth areas without first implementing reasonable measures to accommodate projected growth within existing urban growth areas?***

19. ***Does the continued location of a majority of population growth outside the designated Urban Growth Areas of Kitsap County since adoption of its Comprehensive Plan constitute an inconsistency with CPP A.3 and Plan Policy UGA-1, and thus create an affirmative duty to act under RCW 36.70A.215(4), UGA-4, Implementing Strategy 1, CP-3, CP-4, CP-5, LU-4 and RL-3 to implement measures that are reasonably likely to increase consistency with those policies and, if so, has the County failed to act consistent with that duty?***[42]

20. ***Does the continued residential development at urban densities in the rural areas of Kitsap County since adoption of its Comprehensive Plan constitute an inconsistency with CPP A.3, Plan Policy RL-1, RL-2, RL-8 and RL-9, and thus create an affirmative duty to act under RCW 36.70A.215(4)), UGA-4, Implementing Strategy 1, CP-3, CP-4, CP-5, LU-4 and RL-3 to implement measures that are reasonably likely to increase consistency with those policies and, if so, has the County failed to act consistent with that duty?***

21. ***Did Kitsap County fail to act with regard to the requirements of RCW 36.70A.215 (and Plan policies UGA-4, UGA Implementing Strategies, CP-3, CP-4, CP-5, LU-4 and RL-3) when it failed to identify, adopt and implement measures that are reasonably likely to increase consistency with CPP A.3, the goals and policies of the Comprehensive Plan, Land Use Element directing growth to UGAs, and RCW 36.70A.020(1) and (2)?***

[42] As corrected in the Corrected PHO.

Applicable Law

RCW 36.70A.215 provides in relevant part:

> *(1)* Subject to the limitations in subsection (7)[43] of this section, a county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program. This program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130 and 36.70A.210. In developing and implementing the review and evaluation program required by this section, the county and its cities shall consider information from other appropriate jurisdictions and sources. *The purpose of the review and evaluation program shall be to:*
>
> *a. Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and*
>
> *b. Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.*
>
> (2) The review and evaluation program shall:
>
> a. Encompass land uses and *activities both within and outside of urban growth areas and provide for annual collection of data on urban and rural land uses,* development, critical areas, and capital facilities to the extent necessary to determine the quantity and type of land suitable for development, both for residential and employment-based activities;
>
> b. Provide for the evaluation of the data collected under (a) of this subsection every five years as provided in subsection (3) of this section. The first evaluation shall be completed not later than September 1, 2002. The county and its cities may establish in the county-wide planning policies indicators, benchmarks, and other similar criteria to use in conducting the evaluation;
>
> c. . . .[Develop methods to resolve data disputes]. . .
>
> d. Provide for the amendment of the county-side planning policies and county and city comprehensive plans as needed to remedy an inconsistency identified through the evaluation required by this section, or to bring these policies into compliance with the requirements of this chapter.
>
> (3) At a minimum, the evaluation component of the program required by subsection (1) of this section shall:

[43] Snohomish County is not subject to the limitations noted in subsection (7).

a. Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and cities and the requirements of RCW 36.70A.110;
b. Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) of this section; and
c. Based on the actual density of development as determined under subsection (b) of this subsection, review commercial, industrial and housing needs by type and density range to determine the amount of land needed for commercial, industrial, and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan..

(4) If the evaluation required by subsection (3) of this section demonstrates an inconsistency between what has occurred since the adoption of the county-wide policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, and the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period. If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-side planning policies to increase consistency. The county and its cities shall annually monitor the measures adopted under this subsection to determine their effect and may revise or rescind them as appropriate.

(Emphasis supplied.)

Discussion

Position of the Parties

The Tribe asserts that the expansions of the UGAs at ULID #6, SKIA, and Kingston were contrary to the GMA and the County's own Comprehensive Plan and policies because the County's 2002 Buildable Lands Report demonstrated that sufficient capacity exists within current UGAs to accommodate projected population growth. At a minimum, the County was required to identify and implement reasonable measures to increase

compliance with GMA's anti-sprawl goals, and the goals of the Comprehensive Plan, before considering UGA expansion. Tribe PHB, at 8-18.

The Tribe argues that the County's CPPs state a commitment to base the size and location of UGAs on a county-wide land capacity analysis. The Comprehensive Plan and policies direct that the Buildable Lands Report will be used to update that analysis for the purpose of designating or adjusting UGAs. CPP A.1.a, c, e, and f and Comp Plan UGA-4, LU-4, RL-3. The County intended that the BLR would provide information that will "be drawn upon in updating or revising the required .110 land capacity analyses used to size, locate and designate the County's UGA." *Id.*, at 24.

The County's use of separate holding capacity analyses for each of the three subarea plans was inappropriate, according to the Tribe, particularly in view of updated information on the availability of urban land in the City of Bremerton. *Id*, at 21. The Tribe argues that the BLR demonstrates surplus residential capacity in the UGA through 2012 and more than sufficient to absorb the County's growth forecast to 2017. The BLR identifies a supply of 10,386 acres within the UGAs and a demand, assuming minimum urban densities of 4/du per acre, of 7,272 acres through 2012. *Id.*, citing BLR, Summary Table 7, at 83.

The Tribe points to the Board's recent ruling in *1000 Friends v. Snohomish County*, CPSGMHB Case No. 03-3-0019c, Corrected Final Decision and Order, April 22, 2004, at 39, acknowledging the GMA's clear direction that "UGAs should not be expanded absent a documented unmet need for additional urban land." Tribe Reply, at 28.

The Tribe asserts that the County has an affirmative duty to identify, adopt, and implement measures reasonably likely to increase consistency between the development patterns in the County and the goals and policies of the GMA and the County Plan. The affirmative duty arises from three inconsistencies identified in the Buildable Lands Report: (1) continued location of a majority of population growth outside UGAs (Legal Issue 19); (2) continued residential development at urban densities in rural areas (Legal Issue 20); and (3) urban densities not being achieved in the UGAs (Legal Issue 21). Tribe PHB, at 12-15.

Kitsap County replies that the requirement to adopt reasonable measures to accommodate growth in the urban area before expanding the UGA only applies when a UGA expansion is proposed to remedy a deficiency identified by the BLR. In other words, only if the BLR shows that there's **too little** urban land to absorb projected growth must the County pursue other measures before expanding its UGA. Here the UGA expansions are subarea plans within the intention of the original Comprehensive Plan, as extended to 2017. Because the expansions are not a proposed response to BLR analysis, the reasonable measures clause is not triggered. County Response II, at 34-35.

In any event, since the Kitsap County Comprehensive Plan was not adopted and approved until 1998, and its BLR analyzed development from 1995 to 1999, the BLR contains only one year of relevant data about trends under the Plan. Further, because six subarea plans

have been adopted by the County since 1999, the BLR data "will decrease in relevance." *Id.*, at 41.

The County also asserts that the "failure to act" claims fail because (1) there is "nothing in the statute that requires a jurisdiction to adopt such measures at any specific time," *Id.*, at 39, and (2) the Buildable Lands Report does not reveal inconsistencies that trigger the reasonable measures requirement. *Id.*, at 39. The County argues that Section 215(4) should be narrowly construed to focus only on whether urban densities are being achieved within UGAs, not on rural development patterns or the urban-rural split. *Id.*, at 40.

In reply, the Tribe cites *FEARN v. City of Bothell*, CPSGMHB Case No. 04-3-0006c, Order on Motions (May 20, 2004), at 7-8, where the Board "definitively determined that Section 215 establishes not just a duty to conduct an evaluation, but also establishes a duty to adopt reasonably curative measures when the evaluation reveals inconsistencies, all by a deadline no later than December 1, 2004." Tribe Reply, at 3.

The Tribe points out that Section 215(2) requires review of development trends "both within and outside urban growth areas" and data collection on "urban and rural land uses, development …" *Id.*, at 5. The interplay of vested development on subsidized lots in the rural area and an oversized UGA will perpetuate patterns of sprawl that require countermeasures. *Id.*, at 4-14.

Board Discussion:

The GMA requires cities and counties to accommodate the population growth projected for them by OFM. *See* RCW 36.70A.110(2). The portion of the population that is allocated as urban growth is to be accommodated within the UGAs. *Id.* UGAs are sized, located and designated by counties in consultation with their respective cities, but the counties are the jurisdictions with the duty to designate UGAs. *See* RCW 36.70A.110(1). In order to properly size the UGA, *i.e.*, determine how much land was needed, land capacity analyses are used to calculate the urban land needed to accommodate the projected OFM population. After a very shaky start in its UGA designation process, Kitsap County finally designated compliant UGAs when it revised and adopted the 1998 Comprehensive Plan. *See Bremerton, et al., v. Kitsap County/Alpine Evergreen, et al., v. Kitsap County* (***Bremerton/Alpine***), CPSGMHB Case No. 95-2-0039c Coordinated with Case No. 98-3-0032c, Order Rescinding Invalidity in *Bremerton* and Final Decision and Order in *Alpine*, (Feb. 8, 1999).

In 1997, the legislature amended the Act to add RCW 36.70A.215, which required an additional[44] review and evaluation program for certain counties – including Kitsap County. The *first* "Buildable Lands" review and evaluation was to be completed no later than September 1, 2002. See RCW 36.70A.215(2)(b). As noted *supra*, the *purpose* of

[44] RCW 36.70A.215(1) states, in part, "The [buildable lands] program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130 and 36.70A.210."

the buildable lands review and evaluation program is twofold: 1) to determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and 2) to identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter. Thus, by September 1, 2002, Kitsap County was required to assess urban densities by comparing *its Plan with actual growth that occurred* and *identify reasonable measures to be taken* in lieu of adjusting UGAs.

In August of 2002 the County completed and adopted its "Buildable Lands Analysis 1995-1999"[45] (hereafter, **BLR**). The report looks back, assessing that which has occurred. In Kitsap County's case, it is a 5-year assessment, an early warning sign, which allows the County to consider reallocating population, implement reasonable measures, or take other actions to encourage urban development within the UGAs, thereby avoiding the need to expand them. The County's BLR was not challenged.[46] Whether the data, methodology and evaluation contained in the County's BLR complies with the requirements of .215, is not presently before the Board. Any such challenge of that document would be untimely, unless the County "failed to act."

Petitioners have attempted to frame this issue as a "failure to act." The fact that the County completed and adopted its BLR prior to the statutory deadline appears to defeat this argument. However, review of the County's BLR reveals that it did not "identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter," as required by RCW 36.70A.215(1)(b). Chapter X of the BLR is entitled "Recommendations and Reasonable Measures," but there is no identification of any reasonable measures in this chapter. In short, this chapter indicates that more and better data collection and sharing is needed; it does not mention actions that could be taken to avoid the need for UGA expansion. A required component of the BLR is missing. It appears to the Board that the County "failed to act" by not identifying reasonable measures in its BLR, thereby not complying with the requirements of RCW 36.70A.215(1)(b).

However, the thrust of Petitioners' failure to act challenge is that the BLR reveals inconsistencies between the development that has occurred in the County and what the County envisioned in its Plan. Therefore, the Tribe argues, .215 requires the County to adopt and implement, not merely identify reasonable measures to avoid expanding the UGAs. The County on the other hand, argues there are no inconsistencies revealed by the BLR, so no reasonable measures are necessary.

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[45] The County's BLR is a Core Document that was submitted to the Board by the County.

[46] In commenting on its 2002 BLR, the County notes that its Plan was adopted in 1998, therefore the BLR contains only one year of relevant data about trends under the Plan. Additionally, due to the subsequent adoption of subsequent subarea plans, the County asserts the BLR "will decrease in relevance." County Response II, at 41. The Board agrees, but for other reasons. A brief review of the BLR data and analysis suggests that the actual development densities (indicated by permits or platted lots) was assumed to continue through 2012 and this trend, rather than the "planned densities" was the basis of the evaluation.

The Tribe argues the BLR reveals the following inconsistencies: 1) failure to accommodate 5/6 (83%) of new growth within UGAs as directed by the CPPs and the Comprehensive Plan; 2) failure to achieve appropriate (non-sprawl) urban densities within UGAs; and 3) inappropriate (urban sprawl) development in the rural areas. Tribe PHB, at 12-13.

Kitsap County CPP A.3 provides:

> The Kitsap Regional Coordinating Council shall adopt a new process for allocating the forecasted population for the period 2002-2022 and forward by September 30, 2001, consistent with the requirements of the Growth Management Act. The allocation shall be based on the Buildable Lands Analysis and it shall promote a countywide development pattern *directing over five sixths of new population growth to the designated Urban Growth Areas.* The County and the Cities recognize that the success of this development pattern requires not only the rigorous support of Kitsap County in the rural areas, but also Cities' comprehensive plans being designed to attract substantial new population growth.

Kitsap Countywide Planning Policies (2001), at 5 (emphasis supplied).

The BLR states:

> Residential development has been active in Kitsap County between 1995 and 1999, with a *slight majority of all new residential permits issued in the rural unincorporated area.* [A chart indicates *55% of the residential units permitted are outside UGAs and cities.*] . . . In terms of land area, the *vast majority of new residential land consumed is in the jurisdiction of rural unincorporated Kitsap County.* [A chart indicates *81.9% of the residential acres permitted are outside UGAs or cities.*] . . In rural unincorporated Kitsap County, development *densities average approximately 1 unit per acre,* which represents a midpoint between extremely rural and urban style densities. One development constraint is the large number of smaller, non conforming lots of record. Until these parcels are fully absorbed, the County may face obstacles in directing new growth toward urban areas.

BLR, Executive Summary, at 7-8, (emphasis supplied).

The BLR certainly supports the Tribes contention that the BLR reveals inconsistencies between what is occurring and what the County's Plan is designed to achieve. The BLR identifies development patterns inconsistent with the GMA, the County's CPPs and its Plan. For the County to contend that there are no inconsistencies revealed by the BLR and that reasonable measures are not necessary is in error. The BLR reveals inconsistencies, therefore the County must not only identify reasonable measures, but take action to implement them as required by RCW 36.70A.215(4). As to when the

County must undertake this effort, the Board has set the outside deadline in the *FEARN* case.

The Board recently stated in the *FEARN* case, "if the buildable land review and evaluation . . .demonstrates inconsistencies as noted in RCW 36.70.215(3), then jurisdictions must adopt and implement the identified measures [reasonable measures] to increase consistency." *FEARN*, at 7. The Board went on to say "the outside limit for a local government to adopt reasonable measures to avoid the need to adjust the UGA is the December 1, 2004 deadline established in .130(4)." *Id.*, at 8. Therefore, direct application of this *FEARN* holding would direct that the County would have to identify and implement reasonable measures as required by RCW 36.70A.215(4) by December 1, 2004. Consequently, the Tribe's challenge on this issue is untimely. The County has until December 1, 2004 to discharge this GMA obligation and duty.

Conclusion – Buildable Lands and Reasonable Measures

The Board concludes that the County's BLR demonstrates inconsistencies between the development that has occurred in the County and what is envisioned by the GMA and the County CPPs and Plan. The Act, as interpreted by this Board in *FEARN*, requires the County to implement reasonable measures no later than December 1, 2004. Therefore, the Tribe's challenge in this issue is untimely.

G. INVALIDITY

RCW 36.70A.302 provides in relevant part:

> (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> a. Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> b. Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter . . .

The Board has determined, *supra*, that Kitsap County's adoption of the Rural Wooded Policies in Ordinance No. 311-2003 was **clearly erroneous** and **does not comply** with the rural element requirements of RCW 36.70A.070(5) and was not guided by and does not comply with, Goals 1, 2, 3, 5, 8, 10, 11 and 12 – RCW 36.70A.020(1), (2), (3), (5), (8), (10), (11) and (12). The Board's Order, *infra*, **remands** these provisions of Ordinance No. 311-2003 to the County with direction to take legislative action to achieve compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

The question now before the Board is whether these noncompliant provisions of Ordinance No. 311-2003 substantially interfere with the fulfillment of the Goals of the Act. The Board notes that the Suquamish Tribe, *et al.*, specifically requested [Legal Issue No. 27] invalidity if the Board found noncompliance with any of their issues.

The Board has stated that invalidity is a remedy available to the Board rather than a legal issue that must be posed or a remedy that must be requested in a PFR. "The Board has authority to consider invalidity *sua sponte* regardless of whether or not a party raises it during the proceeding. RCW 36.70A.302(1) and WAC 242-02-831(2)." *King County v. Snohomish County [Cities of Renton and Edmonds – Intervenors]*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 23, 2003), at 18.

The Board has determined the RWL polices to be noncompliant with the Act. However, there are no development regulations in place to implement these noncompliant clustering and density incentive program provisions. Therefore there is no threat that vesting could occur based upon these noncompliant provisions. Consequently, the Board declines to enter a **determination of invalidity** for the noncompliant Rural Wooded Land provisions of Ordinance No. 311-2003.

V. ORDER

Based upon review of the GMA, the Board's Rules of Practice and Procedure, other relevant WACs, case law, prior Orders of this Board and the other Boards, the PFR, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having considered and deliberated on the matter, the Board ORDERS:

1. Kitsap County's adoption of the RWL policies [RL – 10(a) and (b), and RL – 11a through i] in Ordinance No. 311-2003 and set forth in the Errata Sheet, Specific Text Amendments, at 7-10, to Ordinance No. 311-2003, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.070(5)(a), (b) and (c), including the requirement that the RWL policies be harmonized with the goals of the Act. Also, because the County has not complied with RCW 36.70A.070(5)(a), the Board concludes that the adoption of the RWL policies were **not guided by**, and **do not comply** with, the noted goals of the Act – RCW 36.70A.020(1), (2), (3), (5), (8), (10), (11) and (12).

2. The Board **remands** the RWL polices to the County with direction to take appropriate legislative action in order to comply with the goals and requirements of the Act, as interpreted in this Order. In light of the ongoing efforts of the County to address Rural Wooded Lands and the necessity to develop and adopt implementing development regulations along with the necessary revisions to the RWL policies the Board has determined that resolving these matters is one of **unusual scope and continued complexity**. **Therefore, the Board will extend the statutory 180-day statutory deadline for compliance and allow the County a one year compliance period.** The compliance schedule is set forth below:

- By no later than **August 9, 2005**, the County shall take appropriate legislative action to bring its Plan into compliance with the goals and requirements of the GMA, as interpreted and set forth in this Final Decision and Order (**FDO**).

- By no later than **August 23, 2005**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in this FDO. The SATC shall attach copies of legislation enacted [Plan and development regulations] in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on all Petitioners and Intervenors. By this same date, the County shall file a "**Remand Index**," listing the procedures (meetings, hearings *etc.*) occurring during the remand period and materials (documents, reports, analysis, testimony[47] *etc*.) considered during the remand period in taking the remand action.

- By no later than **September 6, 2005**,[48] the Petitioners and Intervenors may file with the Board an original and four copies of Comments on the County's SATC. Petitioners and Intervenors shall each simultaneously serve a copy of its Comments on the County's SATC on the County and each other.

- By no later than **September 13, 2005,** the County may file with the Board an original and four copies of the County's Reply to Comments. The County shall simultaneously serve a copy of such Reply on Petitioners and Intervenors.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter beginning at **10:00 a.m. September 27, 2005** at the Board's offices.

If the County takes legislative compliance actions prior to the August 9, 2005 deadline set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

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[47] If the County intends to rely upon documents or materials submitted in this proceeding, the County should specify which documents from this proceeding it wishes to introduce into the compliance proceeding. Any such documents should be included under a separate heading in the Remand Index. If another party intends to rely upon a prior document submitted in this proceeding, that party should first request that the County include such documents under the separate heading of the Remand Index. If the County declines, a motion to supplement the compliance record should accompany that party's "Comment" brief.

[48] September 20, 2004 is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2).

So ORDERED this 9th day of August 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

Bruce C. Laing, FAICP
Board Member

_____

Edward G. McGuire, AICP
Board Member
(Board Member files a separate Concurring Opinion)

_____

Margaret A. Pageler
Board Member

Board Member McGuire Concurring Opinion

I concur with the conclusions reached by my colleagues in this Final Decision and Order. However, I write separately regarding the Rural Wooded Lands issue. I would have gone further in the analysis presented. I would have added the following discussion:

The parties are correct in their characterization of the Board's prior cases related to rural clustering – compact rural development is within the scope of the Act. Also, lot sizes yielded from cluster development in the rural area are not *per se* urban; however, they must be evaluated in the context of the overall rural land use pattern.

In prior decisions, the Board has also raised a caution that at some point compact rural development may cross the line and no longer have rural character but instead be, and induce, urban development. "[W]hile no clear break point is evident in the information presently before the Board, it is only logical that, at some point along the continuum of potential project size and intensity, the *quantitative* dimension of cluster development in a rural area must have *qualitative* urban growth consequences." *KCRP*, at 16. *See also* RCW 36.70A.070(5)(c) and .030(14) and (15).

In reviewing rural clustering programs, the Board has looked for clear parameters[49] designed to protect rural character and prevent urban growth (*See KCRP* and *Sky Valley*, *supra*); and the Board has looked at the geographic scope of where the proposed clustering program could be applied. (*See Sky Valley*, supra.). Here, the Board acknowledges that the present RWL policies do include "parameters" that could, with further refinement, clarification and supporting analyses provide a basis for protecting rural character and preventing urban growth in the rural area. However, the geographic scope of the RWL policies provides an additional reason supporting the Board's conclusion of clear error and noncompliance with RCW 36.70A.070(5)(a), (b) and (c).

Therefore a fifth reason for finding noncompliance would be the stated parameters and geographic scope of the RWL policies. U*nincorporated* Kitsap County is comprised of 237,934 acres. *See* Updated Table LU-2, page 25 Chapter 2: Land Use, Ordinance No. 311-2003, Errata Sheet, at 4. The Rural Wooded Lands designation accounts for 49,212 acres, or over 20% of the total unincorporated County. *Id.* Therefore 20% of the unincorporated County is potentially subject to the RWL policies. As described in briefing and at the HOM, approximately 2000 acres of the Rural Wooded Lands designation (less than 1%) would be subject to the "Wooded Shoreline Preserve" provisions of RL-11c. These "shorelines" appear to be focused primarily along six-miles of Hood Canal.[50] The geographic scope of these provisions, if refined and clarified with supporting analysis, would appear to me to be appropriate.

[49] Included among these parameters would be a rigorous monitoring and evaluation program.

[50] Apparently some Rural Wooded Shoreline is also near the Port Gamble area.

However, application of the RWL policies to the remaining 47,212 acres (*i.e.* 49,212 minus 2,000 shoreline) designated Rural Wooded is of a geographic scale and scope of such a magnitude to cause the Board to question, lacking supporting analysis, whether rural character could be protected and urban growth prevented if the RWL policies were implemented. This is especially true where the policies could be applied to 1000 contiguous acres. Annual monitoring partially allays my concern if coupled with an established "sunset" provision (based upon a reasonable acreage limitation) that would terminate the program *unless* supporting analysis based upon the monitoring program indicated that it should be extended. Absent these additional parameters, cluster development at this scale, without supporting analysis, approaches, if not crosses the line from protecting rural character to encouraging urban growth.

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

ATTACHMENT - A

PROCEDURAL HISTORY

On February 5, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the City of Bremerton (**Petitioner** or **Bremerton**) with one exhibit attached. The matter was assigned Case No. 04-3-0008. Petitioner challenges Kitsap County's (**Respondent** or the **County**) adoption of Ordinance No. 311-2003 (the **Ordinance**) amending the Kitsap County Comprehensive Plan (the **Comprehensive Plan**), and Zoning Code. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**), and the State Environmental Policy Act (**SEPA**).

On February 11, 2004 the Board received a Petition for Review (**PFR**) from Suquamish Tribe, Kitsap Citizens for Rural Protection a/k/a Kitsap Citizens for Responsible Planning, Jerry Harless and Port Gamble S'Klallam Tribe (**Petitioners** or **Suquamish**). This matter was assigned Case No. 04-3-0009. Petitioners challenge Kitsap County's (**Respondent** or the **County**) adoption of Ordinance No. 311-2003. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). The Board notes that the same Ordinance is challenged in the matter of *Bremerton II v. Kitsap County*, CPSGMHB Case No. 04-3-0008.

On February 11, 2004 the Board received a "Notice of Appearance" from the County in response to the Bremerton PFR.

On February 12, 2004 the Board issued a Notice of Hearing and Order of Consolidation. The Order consolidated case CPSGMHB Case No. 04-3-0008 and CPSGMHB Case No. 04-3-0009 under the case number CPSGMHB Consolidated Case No. 04-3-0009c. The matter was captioned as Bremerton II, et al. v. Kitsap County. The Notice set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case. Board member Bruce C. Laing was designated Presiding Officer.

On February 18, 2004 the Board received a "Notice of Appearance" from legal council for the County in response to Suquamish PFR.

On February 19, 2004 the Board received a "Notice of Association of Counsel" from legal counsel for the County.

On March 4, 2004 the Board received the Overton Family and Alpine Evergreen Co. Motion to Intervene together with the declarations of Laura Overton Johannes and Rod Reid in support of the motion.

On March 4, 2004 the Board received Manke Lumber Co. Motion to Intervene; and on March 5, 2004 the Board received the declaration of Holly Manke White in support of the motion.

On March 5, 2004 the Board received McCormick Land Co. Motion to Intervene, together with the "Affidavit of Linda Niebanck".

On March 8, 2004, the Board received Olympic Property Group Motion to Intervene together with the "Declaration of Jon Rose in Support of Motion of Pope Resources to Intervene."

On March 8, 2004, the Board conducted the prehearing conference on this matter in the Video Conference Room, Attorney General's Office, 23rd Floor, Bank of California Center, 900 4th Avenue, Seattle. Present for the Board were Edward G. McGuire and Bruce C. Laing, Presiding Officer. Representing Petitioner Bremerton were Roger Lubovich, City Attorney and Carol A. Morris. Representing Petitioner Suquamish Tribe, *et al*. was David A. Bricklin. Representing Respondent Kitsap County were Shelley E. Kneip, Deputy Prosecuting Attorney and Samuel W. Plauche. Representing Intervenor Manke Lumber Co. was Margaret Archer. Representing Intervenor Overton Family et al. and Intervenor Olympic Property Group was Elaine Spencer. Representing Intervenor McCormick Land Co. was Robert D. Johns. Also present at the prehearing conference were: Ted Laubey, Port Gamble S'Kallam Tribe; Tom Donnely, Kitsap Citizens for Responsible Growth; Jerry Harless; Mark Bubenik, Attorney for Suquamish Tribe; Ken Attebery, Port of Bremerton; Laura Heisler and Ketil Freeman, externs for the Board.

On March 10, 2004 the Board received "Kitsap County's Submittal of Core Documents" with attachments.

On March 12, 2004 the Board received "City's Revised Legal Issues."

On March 15, 2004, the Board received "City's Final Revised Legal Issues" (**City's Final Revised Issues**) which proposes wording that consolidates Bremerton PFR Issues H, I, and J with Suquamish PFR Issues 3.11, 3.12 and 3.13, and revises the wording of Bremerton PFR Issue C for purposes of clarification. The submittal was accompanied be a cover letter indicating both Petitioners consent to the proposed consolidation of Issues.

On March 15, 2004, the Board issued a Prehearing Order (**PHO**) containing the final schedule and statement of issues for CPSGMHB Consolidated Case No. 04-3-0009c.

On March 22, 2004 the Board received "Respondent's Motion to Dismiss SEPA Issues" (**Kitsap Dispositive Motion**) with six exhibits attached.

On March 22, 2004, the Board received "Motion of 1000 Friends of Washington for Leave to File *Amicus Curiae* Brief" (**1000 Friends *Amicus Curiae* Motion**).

On March 22, 2004, the Board received correspondence from counsel for Petitioners Suquamish on behalf of both counsel for Suquamish and counsel for Kitsap County, advising the Board of two citation errors in the Statement of Legal Issues in the PHO.

On March 23, 2004 the Board issued a Corrected Prehearing Order (**Corrected PHO**) amending the wording of Legal Issues 19 and Legal Issue 25 of the PHO to correct citations contained therein.

On March 23, 2004 the Board received "Manke Lumber Company's Motion Requesting Board to Take Judicial Notice of Prior Briefing, or Alternatively, to Supplement Record" (**Manke Motion to Supplement**) with two attached documents.

The Board received no response to the March 23, 2004 Manke Motion to Supplement.

On March 24, 2004 the Board received the original of the City's Final Revised Legal Issues, a fax copy of which was received by the Board on March 15, 2004.

On March 26, 2004 the Board received Port of Bremerton's "Petition to Intervene" (**Port's Motion to Intervene**), with an attached "Declaration of Ken Attebery."

On March 29, 2004 the Board received correspondence from Kitsap County stating the County has no objection to the Port's proposed intervention, and advising that an "Amended Index of the Record" (**Amended Index**) is expected to be submitted to the Board by April 2, 2004.

On March 30, 2004 the Board received correspondence from counsel for the Port of Bremerton advising the Board that the Port proposes to intervene in support of Kitsap County's position and expects to address Issues 12 through 27 as contained in the PHO.

On April 1, 2004 the Board received "Index of Exhibits to Be Used" from Overton Family, *et al*., Intervenors.

On April 2, 2004 the Board received Kitsap County's Amended Index.

On April 5, 2004, the Board received "Petitioner City of Bremerton's Response to Motion to Dismiss SEPA Issues" (**City Response**), with six exhibits attached.

On April 5, 2004, the Board Issued an Order on Intervention and *Amicus Curiae*.

On April 12, 2004, the Board received "Respondent Kitsap County's Reply on Motion to Dismiss" (**County Reply**), with seven exhibits attached.

On April 15, 2004, the Board received Petitioner Suquamish Tribe Opening Brief (**Tribe PHB**).

On April 15, 2004, the Board received City's Prehearing Brief (**City PHB**).

On April 22, 2004, the Board issued an Order On Motions (**OoM**) which included the following decisions: Admitted Kitsap County's Responsive Brief, Part II dated November 18, 1998 and filed with the Central Puget Sound Growth Management

Hearings Board under consolidated cause number 98-3-0032c as **Supplemental Exhibit No. 1**; admitted State's Response Brief to Manke Lumber Company dated December 15, 1997 and filed under Kitsap County's consolidated cause number 97-2-02979-3 as **Supplemental Exhibit No 2**; **dismissed** with prejudice Legal Issues 1 through 6; and revised the Final Schedule to reflect the dismissal of SEPA issues.

On April 30, 2004, the Board received Errata to Squamish Tribe's Opening Brief and Omitted Exhibits.

On May 3, 2004 the Board issued an Order Correcting Case Schedule.

On May 10, 2004 the Board issued Order Setting Location for Hearing on the Merits with a proposed hearing agenda attached.

On May 12, 2004, the Board received Additional Core Documents from Kitsap County.

On May 12, 2004, the board received Port of Bremerton Prehearing Brief (**Port's Response**).

On May 13, 2004, the Board received Second Amended Index to the Record (**Second Amended Index**).

On May 13, 2004, the Board received Kitsap County's Motion to Strike Petitioners Suquamish Tribe et al. Prehearing Brief Exhibit No. 26150 (**Kitsap Motion to Strike**).

On May 13, 2004, the Board received McCormick Land Company Response Brief (**McCormick Response**).

On May 13, 2004, the Board received Overton Family, et al. Memorandum in Response to Petitioners' Prehearing Brief (**Overton Response**).

On May 13, 2004, the Board received Overton Index to Memorandum in Response to Petitioners' Prehearing Brief (**Index to Overton Response**).

On May 13, 2004, the Board received Kitsap County Prehearing Brief Regarding Issues 7 through 11, 24, 25 and 27 (**County Response I**).

On May 13, 2004, the Board received Declaration of Shelley E. Kneip.

On May 13, 2004, the Board received Manke Lumber Company Response to Petitioners' Prehearing Brief (**Manke Response**).

On May 13, 2004, the Board received Kitsap County Prehearing Brief Regarding Issues 12 through 23, 26 and 27 (**County Response II**).

On May 19, 2004, the Board received Kitsap County letter regarding Order Setting Location for Hearing on the Merits.

On May 24, 2004, the Board received from Kitsap County a Stipulation and Order in which the parties agree to a proposed schedule for the Hearing on the Merits.

On May 25, 2004, the Board received correspondence from Kitsap County objecting to filing of *amicus curiae* brief after the deadline for Petitioners Briefs.

On May 27, 2004, the Board received correspondence from 1000 Friends of Washington stating they will not be filing an *amicus curiae* brief.

On May 27, 2004, the Board received City's Reply to Respondent's Briefs (**City Reply**).

On May 28, 2004, the Board received Petitioner Suquamish Tribe, et al. Reply Brief (**Tribe Reply**).

On June 8, 2004, the Board received Kitsap County's Second Motion to Strike (**Kitsap Second Motion to Strike**).

On June 8, 2004, the Board received correspondence from Suquamish regarding Exhibits "IR-A" and IR-B, and an error on page 14 of Tribe Reply.

On June 10, 2004 the Board conducted a Hearing on the Merits (**HOM**) in the Poulsbo Fire Department Office, 911 Liberty Road, Poulsbo, Washington. Present for the Board were members Edward G. McGuire and Bruce C. Laing, Presiding Officer. Appearing for the parties were: Carol A. Morris for the City of Bremerton; David A. Bricklin for Suquamish Tribe, *et al*.; Samuel W. Plauche and Shelley E. Kneip for Kitsap County; William T. Lynn for Manke Lumber Company; Elaine Spencer for Overton Family, *et al.* and Olympic Property Group; Robert D. Johns for McCormick Land Company. The Court Reporter was Patricia A. Walton, Byers & Anderson, Inc. The Hearing opened at 9:30 a.m. and adjourned at 4:45 p.m.

On June 17, 2004, the Board received Kitsap County letter regarding: Exhibit lists, Kingston Acreage, Shoreline Acreage in Rural Wooded Incentive Program, and response to Statement of Additional Authorities.

On June 18, 2004, the Board received a letter transmitting Manke Lumber Company Exhibit List.

On June 21, 2004, the Board received a letter transmitting City's Exhibit List.

On June 22, 2004, the Board received Suquamish Tribe letter regarding: Exhibit list, Shoreline Acreage, Kingston UGA Acreage, and Petitioner's Statement of Additional Authorities.

On June 23, 2004, the Board received Suquamish Tribe letter transmitting a second Statement of Additional Authorities.

On June 25, 2004, the Board received Manke Lumber Company letter regarding Shoreline Rural Wooded Lands, with enclosure (AR 15701).

On June 25, 2004, the Board received Shelley Kneip Notice of Unavailability.

On June 28, 2004, the Board received Overton Intervenor's letter regarding supplemental authority with enclosure.